IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

WASHINGTON COUNTY, NORTH CAROLINA and BEAUFORT COUNTY, NORTH CAROLINA,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF THE NAVY; GORDON R. ENGLAND, in his official capacity as Secretary of the Navy, and WAYNE ARNY, in his official capacity as Assistant Secretary of the Navy for Installations and Environment (Acting),
Defendants.

Civil No. 2:04-CV-3-BO(2)

THE NATIONAL AUDUBON SOCIETY, NORTH CAROLINA WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE,
Plaintiffs,
v.
DEPARTMENT OF THE NAVY; GORDON R. ENGLAND, Secretary of the Navy; WAYNE ARNY, Assistant Secretary of the Navy for Installations and Environment (Acting); C.S. PATTON, Brigadier General, U.S. Marine Corps, Commanding General, Marine Corps Air Station, Cherry Point,
Defendants.

Civil No. 2:04-CV-2-BO(2)

United States' Motion for Summary Judgment and Memorandum in Support

I. Introduction

This Memorandum of Law is submitted in support of the United States' Motion for Summary Judgment. (The Defendants are often referred to herein as simply the "United States or the "Navy.") In an Administrative Procedure Act case such as this, "A motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record. . . . It informs the judge that he should resolve the case as a matter of law; that there are no triable issues of fact." Hunger v. Leininger, 15 F.3d 664, 669 (7th Cir. 1994), *comparing* Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 678-79 (5th Cir. 1992). (There is no right to a trial in an administrative review proceeding.) Id. This Court should therefore consider and resolve this lawsuit on the Parties' cross-motions for summary judgment, and determine, based on the administrative record supporting the decision being challenged, whether the Navy has met its obligations under the National Environmental Policy Act ("NEPA"), the Coastal Zone Management Act ("CZMA"), and the Coastal Area Management Act ("CAMA").

This case involves a challenge to the validity of the Navy's decision regarding the home basing of the F/A-18 E/F (Super Hornet) aircraft, and specifically the decision to construct and operate a new Outlying Landing Field ("OLF") to support the home basing, and the Navy's proposal to establish two Military Operations Areas over parts of North Carolina.

In the Order on Preliminary Injunction filed in this case on April 20, 2004, this Court pointed out that the role of this Court "is not to substitute its judgment, but to look for a 'clear error' of judgment by the agency." April 20, 2004 Order, p. 15. In looking for whether a "clear error" was made by the Navy, the court may only rule against the agency if it acted arbitrarily and

capriciously. Under this standard, to determine if NEPA was complied with, this Court examines the record to see whether the agency "entirely failed to consider an important aspect of the problem." Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287 (4th Cir. 1999). While there may be differences of opinion regarding locations (including the OLF location) chosen by the Navy for basing and operating the Super Hornet aircraft on the East Coast of the United States, the Navy used accepted scientific methodologies to analyze impacts and took the requisite "hard look" at all of the relevant issues. The Navy, as the agency with expertise regarding military readiness and training requirements for the new Super Hornet aircraft, is entitled to deference regarding its decision set out in the Record of Decision. The Navy's decision should be upheld, judgment on the merits should be entered in favor of the Navy, and the Preliminary Injunction should be lifted.

II. Statement of the Case

This case was initially brought as two separate actions. One was brought by the "Environmental Plaintiffs" (National Audubon Society, North Carolina Wildlife Federation and Defenders of Wildlife). The other was brought by the "County Plaintiffs" (Washington and Beaufort Counties in North Carolina). The Court consolidated these cases for review. At the request of the Parties, this Court entered a Consent Order on October 26, 2004, instructing the Parties to file two separate sets of cross-motions for summary judgment: (1) consolidated briefing on all of the issues except the challenge to the proposed Military Operations Areas ("MOAs"), and (2) briefing by the Environmental Plaintiffs and the United States, concerning the challenge to the Marine Corps' Environmental Assessment concerning the proposed MOAs.

The consolidated cases were brought under the Administrative Procedure Act, 5 U.S.C.

§§ 551 *et seq.* ("APA"), challenging the validity of the Navy's decision regarding home basing of the Super Hornets and its proposal to establish two Military Operations Areas over parts of North Carolina. Plaintiffs allege that the Final Environmental Impact Statement ("FEIS"), which was developed by the Navy pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f ("NEPA") was inadequate, thereby making the Navy's decision arbitrary and capricious. During the period of June 26, 2000 through September 3, 2003, a comprehensive study and evaluation was conducted pursuant to NEPA to determine the best location for locating (or "home basing") Super Hornet aircraft (F/A-18 E/F) on the East Coast of the United States. The Navy's EIS analyzed the environmental impacts of home basing the aircraft, as well as the environmental impacts of support infrastructure, including the construction and operation of a new OLF. After a lengthy and exhaustive review of operational needs, alternatives for meeting those needs, and the environmental impacts of s of each alternative, the Assistant Secretary of the Navy (Installations and Environment) issued a Record of Decision ("ROD"), documenting the Navy's decision to base the new squadrons of Super Hornets at both Naval Air Station ("NAS") Oceana, Virginia and Marine Corps Air Station ("MCAS"), Cherry Point, North Carolina, and to construct and operate a new OLF in Washington County, North Carolina.

In their complaints, both the Environmental and County Plaintiffs allege that the Navy violated NEPA because it failed to take a hard look at how the OLF would impact the wildlife in the area, particularly migratory waterfowl (primarily tundra swans and snow geese which make the area their winter feeding grounds), and the nearby Pocosin Lakes National Wildlife Refuge. This is the primary scope of this memorandum.

The County Plaintiffs also include an allegation that the Navy failed to comply with the

Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-1465, and the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. §§ 113A-101, *et seq.* On March 4, 2004, the United States filed a Motion to Dismiss claims relating to coastal zone management issues. This Court has not ruled on that Motion to Dismiss. This memorandum will deal briefly with those claims; but the Navy's primary arguments concerning those claims are contained in the March 4, 2004 Motion to Dismiss and the April 12, 2004 Reply in Support of Motion to Dismiss.

The Environmental Plaintiffs also allege that the decision to propose the establishment of two MOAs was arbitrary and capricious in that the analysis of environmental impacts contained in the Environmental Assessment ("EA") prepared by the Navy was inadequate. The Super Hornet basing action and the proposal to establish the MOAs are functionally independent actions that were subjected to separate NEPA analysis. There is a completely separate administrative record for the EA prepared for the MOAs proposal and as ordered by this Court on October 26, 2004, that issue is being briefed separately. *See* United States' Motion for Summary Judgment (MOAs Claim), filed herewith.

The procedural history of this case is long, complex, and well known by this Court. Therefore, it will not be repeated in full here. Suffice it to say that there is currently a Preliminary Injunction entered by this Court which prohibits the Navy "from directly or indirectly taking any further activity associated with constructing an OLF in Washington and Beaufort Counties, including but not limited to negotiation for land acquisition, site preparation, and construction, pending resolution of this lawsuit or until further order of [the] court." April 20, 2004 Order, pp. 18-19. The Navy has appealed the validity and scope of the preliminary injunction and filed its appellate brief on October 18, 2004. The Plaintiffs filed their response on

November 22, 2004. The Navy has also filed a Motion to Stay in the Fourth Circuit, which is pending. Two parties have filed motions for permission to file amicus briefs in support of the Navy's position: (1) the Washington Legal Foundation, and (2) the McMullan Family Trust (the owner of Parcel 1 in the core area of the proposed OLF).

Pursuant to the Consent Order entered by this Court on October 26, 2004, all of the briefing on the cross-motions for summary judgment in this case should be completed by January 10, 2005, and oral arguments on the cross-motions for summary judgment are scheduled for January 19, 2005.

III. Factual Background

In 1995, Congress authorized the initial production and testing of the Super Hornet aircraft. These airplanes went through extensive testing, and were declared "operationally effective and operationally suitable" in February 2000. (FEIS p. 1-2).[1]/ The Super Hornets take advantage of the technological improvements in both airframe design and avionics. They can fly farther and carry a heavier payload than the earlier versions of the F/A-18 fighter jets. They perform better in combat situations, and can survive more extensive battle damage. Congress has authorized the production of these aircraft through at least 2010. (FEIS p. 1-2). In 1999, after completion of an EIS, these aircraft began to be introduced on the West Coast of the United States. (FEIS pp. 1-2 to 1-5). Their introduction to the East Coast, however, was dependent

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1/ The parties have agreed that citations to the FEIS and supporting studies (all of which have previously been filed with the Court: FEIS CD-ROM, Exhibit 1; Noise Study, ATAC Study and OLF Siting Study CD-ROM, Exhibit 2; and, BASH Analysis, Exhibit 4, all to United States' Opposition to the Plaintiffs' Joint Motion for a Preliminary Injunction ("Opp. to Mtn. For P.I.")), will be to the appropriate page numbers of the FEIS or studies, whereas all other citations are to pages in the Administrative Record ("AR"), which has been filed with the Court, or to Exhibits filed with the Parties' briefs.

upon the completion of an EIS concerning their home basing. (FEIS pp. 1-1 to 1-5).

A. The Navy's NEPA Process

Before any determination on home basing or any related facilities (including an OLF) had been made, pursuant to NEPA, the Navy embarked on a methodical and detailed examination of the possible locations (alternatives) for the basing of these Super Hornets. The Navy developed detailed operational criteria to screen potential sites for home basing Super Hornets assigned to the Atlantic Fleet. (FEIS pp 2-2 to 203). These criteria included the distance of these sites from the aircraft carrier operating areas and from training ranges, the number and types of runways at each site, the compatibility of Super Hornets operations with existing operations at the site, the types of maintenance and supply facilities available, and the availability of housing, utilities and personnel support facilities. The Navy initially identified 77 different air facilities on the East Coast that had the potential to accommodate these aircraft. These included facilities operated by the Navy, Marine Corps, Air Force, Army, and joint civilian/Air National Guard, (*e.g.*, former military facilities). (FEIS pp. 2-9 to 2-11). The initial screening eliminated 57 of the 77 possible bases. The Navy then conducted a more detailed analysis of the remaining 20 bases, finally identifying one base that met all operational requirements and two bases that could meet all operational requirements at a cost determined to be reasonable by the Navy. (FEIS pp. 2-11 to 2-16). These three bases were ultimately examined in detail in the EIS.

1. The Scoping for East Coast Basing of the Super Hornets

The Navy commenced a public participation process under NEPA. Beginning on June 26, 2000, it published a Notice of Intent in the Federal Register, informing the public that it was preparing an EIS for basing and operating the Super Hornets on the East Coast of the United

States. (FEIS pp. A-49 to A-50). The Navy published notice in seventeen local newspapers, and distributed a letter to 1,054 federal, state and local elected officials and agency representatives, public interest groups, civic organizations and concerned citizens, describing the proposal. It also issued a press release and created and advertised a web site describing the proposed action and the EIS process.

The Navy held eight public meetings in five different states between July 12, 2000 and August 15, 2000. Approximately 2,349 people attended these meetings, 1,052 people visited the web site, and approximately 2,666 comments were received throughout the scoping period, (June 26, 2000 to September 3, 2000). (FEIS pp. A-5 to A-9).

Before preparing the draft EIS, the Navy analyzed all of these comments and determined the major issues that were of interest to the public regarding home basing the Super Hornet aircraft. It also summarized the comments received during the scoping process in a 16 page chart included with the EIS. (FEIS pp. A-26 to A-41).

2. The Navy's Consideration of a New OLF

Originally, the scope of the EIS was simply to determine where to base the Super Hornets on the East Coast. However, while going through the process of identifying possible home basing alternatives described above and identifying facility support requirements for each alternative, the Navy recognized that a new OLF would most likely be required to support some home basing alternatives. One of the screening criteria of the FEIS was the need for "Unrestricted Field Carrier Landing Practice ("FCLP") on Station or at an Outlying Landing Field." Only NAS Oceana had an OLF that met this requirement. The EIS therefore considered construction of an OLF as a required support element in many of the alternatives analyzed in the

EIS. (FEIS pp. 2-60 to 2-62).

In addition to being a requirement for some home basing options, the EIS identifies significant additional advantages of constructing a new OLF. The Navy recognized that optimal training was not occurring at Naval Auxiliary Landing Field ("NALF") Fentress due to restrictions imposed on the FCLP pattern in response to noise complaints from local residents. Limits on the FCLP pattern had degraded optimal FCLP training at NALF Fentress. In particular, residential development within a five mile radius of NALF Fentress had grown by 44% between 1990 and 2000, and this substantially increased the amount of artificial lighting in the area during that period. (Figure G-2, FEIS p. G-6). The Navy determined that in order to simulate landing on a carrier deck at night, it is crucial to have a landing environment that is as dark as possible, and this residential lighting from the increasing population around NALF Fentress has degraded night FCLP training. (FEIS pp. ES-4 to ES-5). In addition, pressure from development has caused the Navy to deviate from the normal carrier landing pattern for FCLPs at NALF Fentress. (FEIS p. 2-75). Both the height and the shape of the landing pattern have been altered. (FEIS p. 2-75).

The Navy recognized that it needed a new OLF to train during "surge" conditions – *i.e.,* "when two or more carrier air wings or FRS [Fleet Replacement Squadron] must simultaneously prepare for carrier operations." (FEIS pp. ES-12, 12-1). The need to be prepared for "surge" conditions became apparent in the aftermath of the operations in Afghanistan in support of the Global War on Terror and during the Navy's preparation for Operation Iraqi Freedom, the latter occurring after the Draft Environmental Impact Statement ("DEIS") had been published. To address and respond to the demands on military readiness imposed during conflicts such as those

experienced in Afghanistan and Iraq, the Navy' developed the Fleet Response Concept ("FRC"). The FRC incorporated many of the lessons learned during "surge" conditions that arose from deployment of multiple Carrier Strike Groups over relatively short periods of time. Thus, the FEIS reflected surge requirements as well as FCLP and other routine training requirements. The need to respond to surge conditions identified a shortfall in capacity to provide FCLP training for a majority of the fleet squadrons using a single OLF and those impacts were incorporated into the discussion of OLF impacts for each alternative. The Navy concluded that having additional OLF capacity was (and remains) an important part of its ability to respond to surge conditions and provided "critical operational flexibility and enhanced responsiveness to meet emergent threats to the national security." (FEIS pp. 2-74 to 2-75). Thus, while a new OLF was not considered a prerequisite to home basing aircraft at NAS Oceana, as was the case for MCAS Cherry Point and MCAS Beaufort, the Navy determined that NAS Oceana needed a new OLF to support surge operations and FCLP training. (FEIS pp. 2-60 to 2-61). The Navy also recognized that an additional OLF would mitigate noise impacts at NAS Oceana and NALF Fentress.

Concurrent with the Navy's NEPA process was a comprehensive siting review process to determine appropriate sites for an OLF that could then be incorporated into the NEPA process. The siting study involved five distinct phases to ensure a full and adequate evaluation of all the possible alternatives in order to achieve the greatest flexibility and most options for the ultimate decision: (1) development of site screening criteria, (2) preliminary site screening, (3) development of the alternatives, (4) physical reconnaissance and airspace evaluations, and (5) synthesis of all information collected into a final site evaluation. (FEIS pp. ES-12 to ES-16).

The initial site screening criteria for the OLF included both operational and

environmental factors. For example, the Navy wanted to site an OLF in areas where there was low population density, no controlled airspace or obstacles (such as towers), no construction that could affect extensive wetland complexes or open areas of water, no national or state parks, national forests, or national wildlife refuges.[2]/ After applying this initial screening criteria, the Navy then used a secondary screening process that attempted to locate a site that had minimal residential use, maximum agricultural use and factors determined favorable for an OLF by the Navy. At this point, the Navy had identified 20 possible sites for an OLF. The Navy then looked in more detail at topographic maps and satellite images, and also spoke to local and regional planning agencies in the potentially affected areas. That process narrowed the potential sites to 15. Further analysis narrowed the range of alternatives to seven sites. These seven sites were then subjected to the fourth stage of the comprehensive siting study – site reconnaissance and airspace evaluation. One of these seven sites (*i.e.*, the Open Grounds Farm site in Carteret County) was eliminated at this stage of the process. The Navy determined that this site was unacceptable because of "operational constraints that could not be overcome." (FEIS p. ES-15). More specifically, this site "would pose an unacceptable safety risk for both FCLP and training range operations."[3]/ These six remaining reasonable alternatives were then incorporated into the

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[2]/ Plaintiffs have confused this last criteria in the siting study. The language used by the Navy was that it wanted to "avoid public interest areas," which includes wildlife refuges. (FEIS p. 2-63). This meant that the OLF should not be located *inside* one of these areas. The Washington County site is not inside such an area. In addition, the projected noise contours at this site do not extend into such an area either. (Figure 12-12, FEIS p. 12-35 and Noise Study p. 4-187).

[3]/ This site is located extremely close to the BT-11 bombing range, which is one of the primary air-to-ground bombing ranges used on the East Coast of the United States. (FEIS p. 2-68). The Navy concluded that locating an OLF there would result in an unacceptable degradation in the quality of air-to-ground bombing training at BT-11 and of FCLP at the new OLF as well as

overall EIS, and considered in more detail as part of the comprehensive NEPA analysis undertaken by the Navy.

With a range of reasonable OLF alternatives identified during the siting process, the Navy conducted additional scoping to determine potential issues to be addressed in the EIS associated with these OLF site alternatives. Between January and February of 2002, the Navy widely publicized the issue of potentially building a new OLF. It sent out 390 letters to state and local officials as well as to agency representatives and concerned citizens in the potentially affected areas. The Navy also issued a press release, and paid for advertising in 9 North Carolina newspapers as well as one in Georgia. (FEIS pp. A-17 and A-18). It amended its web site to add the OLF information to the information already there about the Super Hornet home basing decision. It solicited comments from the public concerning the siting of an OLF, and received 2,249 comments. (FEIS pp. A-18 and A-19). As it did with the comments received in connection with the original scoping process, the Navy summarized the comments both in a chart and in narrative form as part of the NEPA process. (FEIS pp. A-18 to A-25 and pp. A-42 to A-45).

After the additional scoping process was complete, the Navy completed an exhaustive analysis of the environmental impacts for each of the six potential OLF sites, in addition to the home basing alternatives which had begun following the initial scoping period. In all, nearly 5,000 comments were received over the two scoping periods, and considered by the Navy. (FEIS p. ES-16). Prior to publishing the DEIS, the Navy performed an extensive review with its

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create an unnecessarily dangerous environment for both the pilots conducting FCLP practice and for the pilots conducting bombing runs. (FEIS p. 2-68). The reasons for eliminating Open Grounds Farm from consideration are more fully spelled out at pages 30-31, *supra.*

contractor, Ecology and Environment, Inc. ("E&E"), to ensure the DEIS analyzed all relevant environmental and operational issues. This extremely thorough analysis took place over 25 months (June 2000 - July 2002) to ensure that the DEIS was as complete and accurate as possible. (FEIS pp. 1-7 to 1-17).

The DEIS identified one preferred home basing alternative, and two preferred OLF sites. In particular, the Navy's preferred home basing alternative concluded that the Super Hornets should be located at two different locations: (a) 8 of the 10 fleet squadrons, plus the Fleet Replacement Squadron, should be located at NAS Oceana, and (b) the other 2 fleet squadrons should be located at MCAS Cherry Point.[4/] The Navy also made a tentative determination that an OLF would be necessary to support the home basing decision, and that the two preferred sites for a new OLF were the Craven County and Washington County sites.

The Navy published the DEIS on August 2, 2002, and solicited comments for a period of 70 days (until October 11, 2002). (FEIS p. A-67). The Navy distributed over 1,200 hard copy or CD-ROM versions of the DEIS to federal, state, and local agencies, and other interested persons.

[4/] Although the Environmental Plaintiffs' Complaints challenges both the decision to home base the aircraft and the decision to locate the OLF in Washington County, neither they nor the County Plaintiffs sought a preliminary injunction concerning the home basing decision. In the meantime, 25 aircraft have already arrived at NAS Oceana. *See* Declaration of Admiral John Nathman, the Vice Chief of Naval Operations (VCNO), ("Nathman Decl."), Exhibit 1, attached hereto, at para. 25. Additional aircraft are scheduled to arrive February, 2005. Virtually all of the litigation, including discovery, seems to have focused on the OLF decision, not the home basing decision. However, as ordered by this Court, the Plaintiffs served a notice of the remedies they are seeking on the Navy on November 5, 2004; and that notice indicated that the Plaintiffs intended to challenge not only the OLF decision, but the entire ROD (which included the home basing as well), and that they "would seek a permanent injunction prohibiting the Navy from directly or indirectly taking any further activity associated with the Super Hornet project until it has fully complied with NEPA." Letter from Kiran H. Mehta, counsel for Plaintiffs to Stephen G. Bartell & G. Norman Acker, III, counsel for the United States, November 5, 2004, (updated by similar Letter on November 12, 2004). Both attached as Exhibit 2, hereto.

(FEIS p. A-67). In addition, a number of copies of the Executive Summary were also distributed to people who requested it. The DEIS was also distributed to local libraries for viewing by the public, and could be viewed and printed from the Navy's web site. During the public comment period, 3,376 visitors accessed the web site. (FEIS p. A-67). In addition to publishing the notice in the Federal Register, the Navy issued a press release and advertised the availability of the DEIS and schedule of public hearings in 22 local newspapers in four states. (FEIS pp. A-67 and A-68). It also distributed bulletins to local churches and local government offices in the affected areas, and encouraged local radio stations to announce that it was receiving public comments on the DEIS. The Navy also held 13 public hearings in the communities affected. On August 29, 2002, at the public hearing in Plymouth, North Carolina, the Navy was requested to hold an additional public hearing in the neighboring county, Washington County. In response to this request, the Navy scheduled a 14th public hearing, which involved filing a new notice in the Federal Register and other steps to notify the public. (FEIS pp. A-68 to A-70).

A total of 3,854 people attended these public hearings. (FEIS p. A-69). The Navy received 6,486 comments during the 70-day public comment period (FEIS A-70 and A-71), including one from the Environmental Protection Agency ("EPA") commending the Navy for its thorough NEPA analysis.[5]/ (FEIS p. H-1-850). As with the public scoping comments, these public comments were summarized and analyzed by both the Navy's contractor, E&E, and by the

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[5]/ In their evaluation of Navy's DEIS, the EPA (the agency charged with reviewing and grading all Federal EIS's) gave the Navy an "EC-1" rating, indicating that EPA believes the DEIS adequately sets forth environmental impacts . . . [and] no further analysis or data collection is necessary." EPA further stated, "EPA commends the Department of the Navy for its efforts, as the DEIS was organized and the analysis thorough." (*See* FEIS Appendix H, Part 1 of 3, Tab 2-Comment Letters, Representatives, Agencies, and Organizations, page 24 of 30). (FEIS H-1-850).

Navy. (FEIS pp. A-70 to A-91). The FEIS included all of these comments in an appendix, along with the Navy's response to the comments in a massive undertaking that exceeded 3,500 pages. (FEIS Appendix H, Volumes 1-3).

After summarizing and analyzing the public comments, the Navy, along with E&E, determined to do the following with respect to wildlife, wetlands, and BASH, the prominent issues raised in the comments:

1. Directed E&E to conduct additional research on noise impacts, including noise impacts on wildlife. AR 113903 to AR 113909 (Show notional site specific flight tracks and noise contours for each OLF site, and analyze noise sensitive receptors identified by communities - from churches to street corners to Pocosin Lakes National Wildlife Refuge).
2. Contracted with Geo-Marine, Inc. to conduct an independent BASH analysis of all of the potential OLF sites, and in addition, to conduct a month-long radar survey at the one preferred site (Site C in Washington County) which commentors felt had potentially significant BASH concerns. AR 127168 to AR 127174.
3. Met at the proposed Washington County OLF site with representatives from the U.S. Fish and Wildlife Service ("F&WS"), the Audubon Society, Ducks Unlimited, the Nature Conservancy and others to discuss wildlife impact and BASH issues. Two meetings were held; one in December, 2002 and the other in January, 2003. AR 122327 to AR 122328 and AR 118139 to AR 118141.
4. Requested a formal review from the Navy's BASH Program Manager as to the manageability of the BASH situation at the proposed Washington County OLF site. AR 134719 to AR 134721.
5. Met with the U.S. Army Corps of Engineers ("Corps") to discuss wetlands concerns on the proposed Craven County OLF site and to attempt to determine how significant a problem the wetlands would be at that site. AR 118096.
6. Confirmed with the local Natural Resources Conservation Service office that the farmed areas of the proposed Washington County OLF site were considered prior converted cropland (*i.e.*, land that may have once been wetlands, but that are not considered wetlands now). AR 036756. *See* 33 C.F.R. § 328.3.

The FEIS was put out for public review on July 18, 2003. *See* 68 Fed. Reg. at 53,356 (discussing comments on the FEIS) (AR 163587 to 163605). As required by CEQ regulations, 174 copies of the FEIS were sent to 85 Federal and State agencies and 2,653 to citizens and

organizations for a 30-day period as required by CEQ regulations to review the document. The Navy received responses from three Federal and 11 state agencies within that 30-day period, as well as from other individuals and organizations. These responses were taken into consideration in preparing the Record of Decision. Neither the F&WS nor the Corps submitted comments on the FEIS to the Navy during this 30-day review period.

The Navy's NEPA process culminated in a Record of Decision ("ROD") (signed on September 3, 2003), in which the Navy determined to move forward with the preferred home basing and OLF alternatives set forth in the FEIS.[6/]

As indicated above, the decisions for East Coast home basing and any additional facilities were not made until after complete and thorough NEPA analysis (including the analysis of military readiness and operational needs) had been completed by the Navy. The Navy decided to base 8 fleet squadrons (96 aircraft) and the Fleet Replacement Squadron (24 aircraft) at NAS Oceana and two fleet squadrons (24 squadrons) at MCAS Cherry Point. Twenty-five of these aircraft and associated personnel have already arrived at NAS Oceana. All of the aircraft are scheduled to be in place by 2010. (FEIS p. 1-5). These aircraft are necessary in order to give the Navy the "flexibility to incorporate future systems and technologies to meet emerging threats." (FEIS pp. 1-1 to 1-2).

As demonstrated above, the administrative record reveals that the Navy took a "hard

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6/ On September 10, 2003, the Navy published the Department of Defense, Record of Decision for Introduction of F/A-18 E/F (Super Hornet) Aircraft to the East Coast of the United States, 68 Fed. Reg. 53,353 to 53,359 (Sept. 10, 2003) ("ROD") (correction at 68 Fed. Reg. 56,821 (Oct. 2, 2003), attached hereto as Exhibit 3, selecting the preferred alternative contained in the FEIS, issued in July, 2003. That final decision is supported by a 194,018 page administrative record comprised of 37,608 documents.

look" at the environmental issues in this matter. From the onset of the EIS process through its conclusion, the Navy provided numerous opportunities for the public, and other governmental agencies, public interest groups and individual citizens to be heard. It seriously considered all of the comments submitted during the scoping period, the DEIS public review and comment process, and the FEIS review period. The Navy painstakingly summarized and analyzed the comments over a period of 37 months. In response to these comments, it reviewed and, where appropriate, revised its findings and conclusions.

IV. Applicable Legal Standards

A. Appropriateness of Summary Judgment

The disposition of a case on the basis of the parties' cross-motions for summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also*, Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jakubiak v. Perry, 101 F.3d 23, 25 (4th Cir. 1996). "When the court, as here, reviews the decision reached by an administrative agency, the summary judgment motion stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review." Krichbaum v. Kelley, 844 F. Supp. 1107, 1110 (W.D. Va. 1994), *aff'd,* 61 F.3d 900 (4th Cir. 1995). Consequently, the Court here must limit its review of the Navy's decision regarding the East Coast basing of the Super Hornet, and establishment of a new OLF in Washington County, to the administrative record before the Court. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973).

In order to survive summary judgment a plaintiff under the APA "must point to facts in

the administrative record--or to factual failings in that record--which can support his claims under the governing legal standard." Kelley, 844 F. Supp. at 1110. To meet this burden, a plaintiff must use detailed evidence, not conjecture, to clearly controvert the analysis in Navy's NEPA documents. *See* Kleppe v. Sierra Club, 427 U.S. at 412-414; Hodges v. Abraham, 253 F. Supp. 2d 846, 854 (D.S.C. 2002), *citing* Lower Alloways Creek Tp. v. Public Service Elec., 687 F.2d 732, 740-41, 743, 747-748 (3d Cir. 1982)(plaintiffs cannot submit conclusory arguments under NEPA, allegedly resting on "common sense" only, without substantiating them with detailed evidence.).

B. Standard of APA Review

Plaintiffs brought this case under the Administrative Procedure Act, 5 U.S.C. Section 551 *et seq.* ("APA"). Under the APA, Congress expressly waived sovereign immunity to authorize judicial review of a final agency action. 5 U.S.C. §§ 701-706; Franklin v. Massachusetts, 505 U.S. 788, 797 (1992); Jersey Heights Neighborhood Association v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Plaintiffs' basis for challenging the Navy's decision lies in their allegations that the Navy failed to follow procedures set out in the NEPA and the CZMA. *See generally*, Env. Pltfs' and Cty. Pltfs' Complaints. Because NEPA and the CZMA do not provide a cause of action, a federal agency's actions under these acts are reviewed under the APA, 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"); Citizens to Preserve Overton Park v. Volpe,

401 U.S. 402, 410 (1971); Jersey Heights, 174 F.3d at 186; Hughes River, 165 F.3d at 287-88.

In Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), the Court stated that "'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" Id. at 470 U.S. at 743 (*quoting*, Camp v. Pitts, 411 U.S. at 142); Burgin v. Office of Personnel Management, 120 F.3d 494, 497 (4th Cir. 1997); Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1335 (4th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1024 (4th Cir. 1975), *cert. denied*, 423 U.S. 912 (1975).7/ "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision on the record the agency presents to the reviewing court." Florida Power & Light Co., 470 U.S. at 743-44 (*citing*, Overton Park, 401 U.S. at 402).

The Supreme Court has set the applicable standard for APA review of agency action. Overton Park, 401 U.S. at 416. The Court stated that the ultimate standard of review is a narrow one because the court is not empowered to substitute its judgment for the agency's. Id. In

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7/ Consistent with the principle that the Court's review is limited to the administrative record, the Fourth Circuit has allowed the admission of extra-record material under only limited exceptions. *See* Krichbaum v. United States Forest Service, 973 F. Supp. 585, 589 (W.D. Va. 1997), *aff'd*, 139 F.3d 890 (4th Cir. 1998). *See also* Citizens to Preserve Overton Park, 401 U.S. at 420. The United States previously moved to strike several exhibits that were submitted by the Plaintiffs in support of their Joint Motion for Preliminary Injunction ("Mtn. for P.I."). The Court has not yet ruled on the United States' Motion to Strike. This is a record review case and as explained in the United States' Motion to Strike, Plaintiffs attempted to use their Mtn. for P.I. as a vehicle to introduce improper extra-record evidence before this Court. While plaintiffs may submit evidence as it relates to their standing, alleged injuries and the balance of harms, several exhibits attached to, and discussed in Plaintiffs' Mtn. for P.I. clearly fall outside this limited exception. Accordingly, to the extent Plaintiffs seek to submit additional improper extra-record evidence, or refer to that evidence that was previously submitted, the United States renews its Motion to have such evidence stricken.

addition, an agency's action is entitled to the presumption of administrative regularity, and thus judicial review of a plaintiff's challenge to an agency's decision should be deferential. Id.

A reviewing court should affirm the agency's decision unless that action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A), *see also*, Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 378 (1989); Overton Park, 401 U.S. at 413; Hughes River, 165 F.3d at 287-88; Central Elec. Power Co-op., Inc. v. Southeastern Power Admin., 338 F.3d 333, 337 (4th Cir. 2003); Comsat Corp. v. National Science Foundation, 190 F.3d 269, 274 (4th Cir. 1999). To justify reversal under the APA "arbitrary and capricious" standard, the reviewing court must find that the agency's decision was "a clear error in judgment." Hughes River, 165 F.3d at 290 (*citing*, Marsh, 490 U.S. at 378). Under this standard, administrative action should be upheld if the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 105 (1983); *see also*, Overton Park, 401 U.S. at 413.

Additionally, in determining the adequacy of an EIS under the arbitrary and capricious standard of review, courts may not use NEPA as a "crutch for chronic faultfinding," Coalition for Responsible Reg. Dev. v. Coleman, 555 F.2d 398 (4th Cir. 1977). Rather, "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (*quoting* Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)). Accordingly, courts generally defer to an agency's choice of methodology for projecting impacts.

As the Fourth Circuit has recognized, when considering environmental impacts under NEPA "[a]gencies are entitled to select their own methodology as long as that methodology is reasonable." Hughes River, 165 F. 3d at 289 (*citing*, Baltimore Gas & Electric v. Natural Resources Defense Council, 462 U.S. 87, 100-01; Webb v. Gorsuch, 699 F.2d 157, 160 (4th Cir. 1983) (holding that where there is conflicting expert opinion, the agency and not the court is to resolve the conflict)). This is consistent with the holding that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378. The court's role is not to weigh conflicting expert opinions or to consider whether the agency employed the best scientific methods and the fact that Plaintiffs dispute the agency's findings and conclusions is not a sufficient basis for the Court to conclude that the Navy's action was arbitrary and capricious.

C. National Environmental Policy Act

The purpose of the National Environmental Policy Act ("NEPA") is to focus the attention of the government and the public on the likely environmental consequences of a proposed agency action. Marsh, 490 U.S. at 371. NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of the proposed action" and "it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Baltimore Gas & Electric, 462 U.S. at 97 (*citing*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978); Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981)).

The Fourth Circuit, in Hodges v. Abraham, 300 F.3d 432, 438 (4th Cir. 2002), *cert.*

denied, 537 U.S. 1105 (2003), has explained that "[t]he purpose of NEPA is two-fold. First, it ensures that an 'agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" Id. *citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "Second, compliance with NEPA procedures 'ensures that relevant information about a proposed project will be made available to members of the public so that they may play a role in both the decisionmaking process and the implementation of the decision." Id. *citing* Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir.1996); 40 C.F.R. § 1500.1(b) (The NEPA process requires that environmental information be available and subject to comment, review, and analysis by public officials and citizens prior to decisions being made). Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500-1508, provide guidance in the application of NEPA. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

"NEPA does not work by mandating that agencies achieve particular substantive environmental results." Marsh, 490 U.S. at 371; *see also*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980) (*per curium,* J. Marshall *dissenting*). "It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." Methow Valley, 490 U.S. at 350. Thus, a court may not require agencies "to elevate environmental concerns over other, admittedly legitimate, considerations." Stryker's Bay, 444 U.S. at 228 n. 2. Other statutes may impose substantive environmental obligations on federal agencies, but "NEPA merely prohibits uninformed — rather than unwise — agency action." Hodges v. Abraham, 300 F. 3d 432, 438 (4th Cir. 2002), *quoting* Methow Valley, 490 U.S. at 349.

NEPA requires a federal agency to prepare an environmental impact statement ("EIS") detailing the environmental impacts of every "major federal action. . . significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Sugarloaf Citizens Ass'n v. F.E.R.C., 959 F.2d 508, 512 (4th Cir. 1992).

Courts inquire whether an agency brought "good faith objectivity rather than subjective impartiality" to its EIS. Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1026 (4th Cir. 1975) *cert. denied,* 423 U.S. 912 (1975). "The NEPA process involves an almost endless series of judgment calls. . ." and while it "is of course always possible to explore a subject more deeply and to discuss it more thoroughly," the "line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987).

As part of the environmental review process, the agency must identify, explore, and consider a "reasonable" range of alternatives. 42 U.S.C. § 4332(C)(iii) and (E); 40 C.F.R. § 1502.14. The courts have defined "reasonableness" as including some notion of feasibility. Vermont Yankee, 435 U.S. at 551. If challenged, a court reviews the range of alternatives selected by the agency under the "rule of reason" standard. Id. It is not necessary, however, for an EIS "to discuss remote or speculative alternatives." State of North Carolina v. Federal Aviation Admin., 957 F.2d 1125, 1134 (4th Cir. 1992). *See* Vermont Yankee, 435 U.S. at 551; Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398, 402 n. 19 (4th Cir.1977).

The Supreme Court has defined the type of reasoning that reviewing courts must uphold under NEPA. The Court has concluded that NEPA documents must be upheld if an agency

conducts a "reasoned evaluation" of environmental factors in them. Marsh, 490 U.S. at 377, 385. The Supreme Court has defined a "reasoned evaluation" under NEPA as having two components: an agency must (1) consider "the relevant factors" and (2) articulate "a rational connection between the facts found and the choice made." Baltimore Gas & Electric, 462 U.S. at 105.

Under this standard, once an agency adequately identifies and evaluates the relevant environmental factors, it "is not constrained by NEPA from deciding that other values outweigh the environmental costs." Methow Valley, 490 U.S. at 350.

"Once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; *it cannot interject itself within the area of discretion of the executive as the choice of the action to be made.*" Strycker's Bay, 444 U.S. at 227-28 (emphasis added, internal quotations omitted). The Fourth Circuit explained that "*if the agency has taken the required 'hard look,' [a court] must defer to it unless its decisions were arbitrary or capricious.*" Hodges v. Abraham, 300 F.3d 432, 438 (4th Cir. 2002) *citing* Hughes River, 81 F.3d at 443 (emphasis added).

The Supreme Court has held that an agency takes a sufficient "hard look" when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised. *See* Marsh, 490 U.S. at 378-85; Hughes River, 165 F.3d at 288. Although an agency should consider the comments of other agencies, it does not necessarily have to defer to them when it disagrees. *See* Roanoke River Basin Ass'n v. Hudson, 940 F.2d 58, 64 (4th Cir.1991), *cert. denied*, 502 U.S. 1092 (1992). As long as the adverse environmental effects of a proposed action are sufficiently identified and evaluated, an agency is vested with discretion to determine under NEPA that other values

outweigh the environmental costs. *See* Marsh, 490 U.S. at 378; Hughes River, 81 F.3d at 443.

Therefore, in assessing the merits of Plaintiffs' contentions, the Court should consider whether the Navy adequately identified and evaluated, prior to its September 3, 2003 ROD, the environmental consequences of the constructing and operating an OLF at Site C and all reasonable alternatives to that action.

V. Argument

A. The Navy's Has Fully Complied with NEPA (and the CZMA)[8]/

In compliance with NEPA, as well as CEQ regulations implementing NEPA, and the Navy's internal NEPA regulations, the Navy prepared an exhaustive EIS which fully analyzed the environmental impact associated with its decision to home base Super Hornet squadrons at NAS Oceana and MCAS Cherry Point and to construct an OLF at Site C, in Washington County, North Carolina. The EIS took a hard look at all relevant environmental impacts associated with basing and operating the Super Hornet. The Navy's analysis involved several major studies: The ATAC Study (an airfield and airspace study prepared by ATAC Corporation to determine the capability of the alternative air stations, special use air space, and training ranges, to accommodate operations associated with home basing the Super Hornet aircraft), the OLF Siting Study (a screening study to identify a reasonable range of alternative OLF sites to be considered in the EIS), the Noise Study (a aircraft noise study prepared by Wyle Laboratories, Inc. to model baseline and projected noise exposure and Accident Potential Zones for all alternatives considered in detail in the EIS)(all three studies on CD-ROM, Exhibit 2 to Opp. to Mtn. for P.I.),

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[8]/ The discussion of the Navy's compliance with the CZMA is set forth *supra* at Section 8, pp. 56-58.

and the BASH Analysis ("Bird Aircraft Strike Hazard (BASH) Analysis, Proposed Outlying Landing Fields (OLF)" prepared by Geo-Marine, Inc., June 2003, based on the US Air Force's Bird Avoidance Model and site-specific evaluations). Exhibit 4 to Opp. to Mtn. for P.I.

The Navy also fulfilled the requirements of NEPA to solicit and address the public's concerns. (*See generally*, FEIS Section 1.2 and Appendix H). Particular care was given to the potential impact of training on birds, wildlife and other natural resources. (*See* FEIS pp. 12-66 to 12-93, 12-107 to 12-168, and Appendix B, B-26 to B-46).

As discussed in the FEIS Section 1.2, additional analysis was conducted based on the comments received on the DEIS. Supplemental analyses presented in the FEIS based on comments received on the DEIS included: clarifying the life cycle cost analysis (FEIS Section 2), expanding the discussion of the OLF siting study (FEIS Section 2), updating the analysis of the potential for the proposed action to disproportionately impact minority and low income populations (FEIS at 4-5, 6-5, 8-5, and 12-5), revising the analysis of impact on local tax revenues from construction and operation of an OLF (FEIS p. 12-5), expanding the discussion of potential aircraft noise impacts (Appendix B), enhancing the BASH discussion and undertaking a radar study for Site C (FEIS p. 12-9), expanding the cumulative impacts analysis (FEIS Section 13), and revising the projected noise exposure analysis at the proposed OLF sites to address specific impacts by county (FEIS p. 12-2). In sum, the Navy's EIS fully comports with NEPA and the United States should be granted summary judgment with respect to Plaintiffs' NEPA challenges because the claims asserted are unsupported by the administrative record.

B. <u>The Plaintiffs' Specific Objections to the FEIS are Without Merit</u>

The Plaintiffs nonetheless allege that the Navy failed to comply with federal regulations

in the preparation of the FEIS under NEPA and have used a shotgun-style approach criticizing many aspects of that document. Plaintiffs argue that the Navy failed to take a "hard look" at the environmental impacts associated with home basing Super Hornet aircraft on the East Coast, specifically: 1) the impacts associated with the construction of an OLF at Site C; 2) the cumulative impacts of the proposed OLF in conjunction with the Navy's proposed Military Operations Areas ("MOAs") and; 3) at alternatives to constructing the OLF at Site C. Plaintiffs also assert that the Navy minimized the environmental impacts of the OLF, including the impacts on migratory birds and the Bird Aircraft Strike Hazard (BASH), and neglected to provide adequate mitigation measures in connection with the OLF. Plaintiffs further allege that changes to the Navy's proposal and certain new information that developed after the issuance of the Final EIS have triggered the requirement for a Supplemental EIS (SEIS). Env. Compl. at ¶¶ 165-187 and Cty. Compl. at ¶¶ 201 - 227. None of these claims has merit.

Contrary to these allegations, the Navy fully complied with NEPA and prepared a detailed and exhaustive DEIS, followed by an over 3,500 plus page FEIS, which took a hard look at the relevant environmental impacts associated with home basing the Super Hornets and the construction and operation of support infrastructure including the OLF at Site C. In doing so the Navy examined a range of six alternative OLF sites to support the FCLP operations of the Super Hornet squadrons. The Navy considered the environmental impacts of the OLF, including the impacts on migratory birds and BASH, and the cumulative impacts of the proposed OLF in conjunction with the MOAs proposed by the Marine Corps. (FEIS pp. 13-14 to 13-15). The Navy also provided adequate mitigation measures in connection with the OLF. For each site studied, the FEIS discussed the existing environment that may be affected by the proposed action

and the potential environmental impacts of the proposed action. (FEIS Sections 11 and 12). The Navy also committed to work with resource agencies to further minimize environmental impacts at the OLF site. 68 Fed. Reg. 53,356.

On October 26, 2004, this Court ordered the Plaintiffs to identify the specific issues they intended to brief in their Motion for Summary Judgment. Plaintiffs complied with that Order by sending a letter on November 5, 2004 with the following language, "with respect to the OLF issues, Plaintiffs foresee moving for summary judgment in the following areas:

1) Alternatives and objectivity
2) Impacts upon wildlife and wildlife refuges
3) BASH
4) Wetlands
5) Cumulative Impacts
6) Mitigation measures
7) Failure to prepare an SEIS
8) CZMA"

Letter from Kiran H. Mehta, counsel for Plaintiffs to Stephen G. Bartell & G. Norman Acker, III, counsel for the United States, November 5, 2004 (updated by similar Letter on November 12, 2004). Both attached as Exhibit 2, hereto. As demonstrated below, the Navy has complied with the requirements of NEPA in each of these areas.

1. The Navy Took a Hard Look at all Reasonable Alternatives

Here, the Navy's detailed consideration of reasonable alternative sites for the OLF fully satisfies NEPA. NEPA requires consideration of "alternatives to the proposed action" in an EIS, which the CEQ regulations define as a "no action" alternative and a range of "reasonable alternatives." 42 U.S.C. 4332(C) & (E); 40 C.F.R. 1502.14(a), (d). The regulations direct that the reasons for eliminating any alternatives from detailed consideration should be briefly described.

40 C.F.R. 1502.14(a). The "purpose and need" underlying the proposal defines the bounds of a reasonable alternative analysis. 40 C.F.R. 1502.13; Vermont Yankee, 435 U.S. at 551.

County Plaintiffs allege generally that the Navy failed to "rigorously explore and objectively evaluate" reasonable alternatives to construction of an OLF at Site C. Cty. Compl. at ¶¶ 129, 207, 212, 240, 245. Similarly, Environmental Plaintiffs assert that the Navy failed to rigorously explore and objectively evaluate reasonable alternatives to the proposed OLF, failed to rigorously explore the proposed OLF site in Carteret County, and failed to objectively evaluate alternative OLF sites by applying appropriate and accurate wetland identification methodologies. Env. Compl. at ¶¶ 178 - 181. *See also* Mtn. for P.I. at 49.

The Navy considered a range of six alternatives for the OLF in detail, the selection of which was informed by their basic policy objectives. The Navy's detailed consideration of that range of alternative sites fully satisfies NEPA. *See* 40 C.F.R. 1502.14(a). Home basing alternatives were developed based upon geographic location, airfield capacity, airfield infrastructure, available ranges, and available airspace. Eight home basing alternatives were identified that met the purpose and need of the proposed action - the basing and operation of up to 144 Super Hornets. The methodology employed by the Navy in developing alternatives and the relative importance of factors was explained in detail in Chapter 2 of the EIS. The range of alternatives selected by the Navy comports with the direction of the Supreme Court and Fourth Circuit, as discussed *supra* and fully satisfies NEPA's requirements.

Plaintiffs also argue that the Navy "summarily dismissed detailed review and consideration of Open Grounds Farm [Carteret County]. . . ." Mtn. for P.I. at 52, and failed to adequately explain why it could not manage the conflict between Navy and Marine Corps

training programs at the proposed Carteret County location. Plaintiffs' assertions are incorrect, as the Navy did an exceptionally thorough analysis in its review of OLF alternatives, including the Open Grounds Farm site, before settling upon Site C as the location for the OLF.

In the OLF Siting Study, site 6A [*i.e,* Carteret County/Open Grounds Farm site] was removed because of operational considerations. (*See* OLF Siting Study Section 5.1.2, Table 5-1, p. 5-3) The rationale for this conclusion is spelled out specifically on page 5-16 of the OLF Siting Study and also in the DEIS on pages 2-63. The DEIS states specifically:

> This area is currently used for Navy and Marine Corps training. Stratifying airspace (i.e., carving out an altitude block from surface to 2,500 feet) in order to create an FCLP sanctuary would limit target run-in headings, decrease the size of R-5306A, and diminish the value of the training range. In addition to its location with R-5306A, it is extremely close (less than 8NM) to the Piney Island Target Complex (BT-11). OLF entry and exit points could potentially impinge upon the range's 5-mile safety buffer zone and was considered a significant operational concern. This location would create an unacceptable safety risk for both FCLP and target operation. For this reason, this site was eliminated from further consideration. (*See* DEIS page 2-63, AR 094708).

The Plaintiffs nonetheless assert that the Navy "must explain why it cannot manage these facilities in a manner to avoid potential conflict." Mtn. for P.I. at. 52. The Navy is not required to consider unreasonable alternatives, for example, options that will result in a degradation of its operational requirements. The requirement under the law, is to consider *reasonable* alternatives. 40 C.F.R. § 1502.14. Given the operational constraints identified, Open Grounds Farm is not a reasonable alternative, and accordingly the Navy was not required to further evaluate it, let alone consider how the site could be utilized at the expense of mission requirements and training fidelity.

This Court, in Warren County v. State of North Carolina, 528 F. Supp. 276, 294

(E.D.N.C. 1981), explained that it found the Supreme Court's language in Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519, 551 (1978) to be instructive:

> Common sense also teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

2. The Navy Adequately Considered the Impact on Wildlife and the Pocosin Lakes National Wildlife Refuge

NEPA requires consideration of direct effects (effects "caused by the action and occurring at the same time and place"), indirect effects (effects that are "later in time or farther removed in distance, but are still reasonably foreseeable"), and cumulative impacts ("incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"). 40 C.F.R. §§ 1508.7, 1508.8.[9/] The Navy's FEIS satisfies these requirements and Plaintiffs' arguments to the contrary are completely without merit. *See* FEIS Sections 4, 6, 8, 10, 12, and 13.

Plaintiffs allege that the Navy failed to adequately address, or take a "hard look" at, the entire range of impacts to be assessed under NEPA. *See* Cty. Compl. at ¶¶ 5(a)-(b), 208, 217. *See also* Env. Compl. at ¶ 172(f), 175. Specifically, Plaintiffs assert that the FEIS inappropriately minimizes the impact of the OLF on migratory birds and the Refuge. *See* Cty. Compl. ¶ 68, 206; *see also* Env. Compl. at ¶ 39, 115, 172(b). These allegations are unpersuasive. Even the most cursory review of the analysis of the potential impacts of the proposed OLF reveals the Navy's thorough consideration of the direct, indirect and cumulative environmental

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9/ "Effects" and "impacts" are used synonymously in the regulations. 40 C.F.R. § 1508.8.

impacts of the OLF. *See, e.g.*, Section 12 of the FEIS.

The administrative record contains numerous documents reflecting not only review of extensive scientific literature relevant to potential environmental impacts of the OLF, but also demonstrates the Navy's consultation with experts on the various environmental resources, such as migratory birds and the Refuges. In the administrative record, for example, these documents include reviews of relevant studies and site specific analyses by biologists and Navy personnel to ensure accurate assessment of impacts. As demonstrated below, the Plaintiffs are simply wrong; the Navy has taken a "hard look" at the environmental impacts and fully complied with NEPA.

The FEIS clearly acknowledges and analyzes the potential impacts of the OLF at Site C on wildlife in the area, particularly on tundra swans and snow geese that spend the winter at the Pungo Unit of the Pocosin Lakes National Wildlife Refuge ("NWR"). *See* FEIS pp. 12-120 to 12-123. The species-specific discussion in the FEIS demonstrates that the Navy was very much aware that five different studies have concluded that aircraft flights at various altitudes disturb snow geese and can cause them to flush. The Navy also acknowledged that snow geese, according to one study, are the waterfowl most sensitive to aircraft noise. (Appendix B, p. B-43; AR 008047-52). The Navy went on to conclude, however, that the potential impacts of operations at Site C were expected to be minimal and that, in addition, the Navy would work with the F&WS to further mitigate any impacts. (FEIS 12-120 to 12-123). While Plaintiffs disagree with this conclusion, the issue before this Court is not whether the Plaintiffs (or even this Court) agree with the conclusion reached by the Navy. The issue, instead, is whether the Navy gave these issues a "hard look" by reasonably considering the various opinions expressed by the public as well as its own experts.

There are two primary rationales supporting the Navy's conclusions about the manageability of impacts through mitigation. First, the vast majority of the low-level air operations at the OLF (86%) would take place several miles outside of the Pungo Unit of the NWR. Second, the research available indicates that although some flushing was likely to occur from the small number of aircraft overflights that would come near the Refuge, little evidence exists on the long-term effect to the birds (FEIS p.12-121).

In fact, other research indicates that bird populations thrive, even in close proximity to other military air operations, and that many species of wildlife (including waterfowl) tend to habituate to the noise created by these operations. (FEIS p. 12-121, Appendix B p. B-46). Although no studies exist that analyze the long-term effects of aircraft noise on snow geese, the absence of observed effects may be explained by the biological concept of "habituation," that is, the species become accustomed to the noise and adapts to it. The Navy's hypothesis is supported, in part, by the Navy's observation that:

> High-speed, low-level (to surface)[10]/ military jet flights currently occur in the airspace (R-5314) above Pocosin Lakes NWR. *Thousands of snow geese winter within this refuge despite the active presence of low-level military aircraft flights.* (FEIS, p. 12-121) (emphasis added)

In other words, the waterfowl that winter at the Pocosin Lakes NWR and Lake Phelps thrive despite the presence of *existing* military aircraft operations. While most of the Pungo Unit is located slightly south of R-5314, the airspace extends over the entire length of Lake Phelps. Lake Phelps "functions as a significant habitat area for wintering waterfowl. Up to 30,000 snow geese and swans congregate at Lake Phelps during the winter months." (FEIS p. 11-36). This

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[10]/ The FEIS is incorrect when it states that these flights go down to the surface. The floor for these routes is actually 1,000 feet AGL.

heavy use of Lake Phelps by migratory waterfowl despite the presence of R-5314 supports the Navy's observation that the "annual high concentration of snow geese and other migratory waterfowl at Pocosin Lakes NWR suggest that some habituation may occur." (FEIS, p. 12-121).

In any event, Plaintiffs' concerns about the impacts of the OLF on snow geese and tundra swans, both inconsistent with the analysis in the FEIS, are overstated. The FEIS acknowledged that, in general, "while snow geese and tundra swans would . . . be present in the agricultural fields comprising much of the remaining area beneath the low-level flight paths . . . concentrations of geese and swans in these areas would be highly variable and significantly lower than those encountered in proximity to the eastern approach and holding-pattern flight paths." FEIS p. 12-120. The FEIS found that the highest concentrations of snow geese and tundra swans are, in fact, located within or immediately adjacent to the boundaries of the NWR. (FEIS, p.12-139). The OLF site is located approximately 5 miles west of the Pungo Unit of the Pocosin Lakes NWR (FEIS, p. 11-36). No state or federal conservation easements managed to enhance the attractiveness of the agricultural lands to migratory waterfowl are located within 4.5 miles of the OLF site (FEIS, Figure 11-7, p. 11-37 and p. 11-42). In addition, contrary to Plaintiffs' claim that the Navy will manage lands around the Pungo Unit to exclude birds, the Navy plans to outlease significant portions of the 30,000 acre OLF site so that farming activities can continue with few or no restrictions on the types of crops grown. 68 Fed. Reg. 53,353-359.

The record further establishes that the bulk of flights using the OLF will not occur near the refuge. Eighty-six percent of low-level flights associated with the OLF site would occur within approximately 1.5 miles of the OLF site, which corresponds to the FCLP flight tracks (FEIS, Figure 12-4, p. 12-11). "A relatively small portion of the low-level flight tracks at Site C,

where flight altitudes will range from 2,000 to 2,500 feet AGL, will be located above or adjacent to significant snow goose and tundra swan loafing and foraging areas located outside of the Pocosin Lakes NWR boundary."[11]/ 68 Fed. Reg. 53356.

In their challenge to the FEIS' analysis of wildlife impacts, Plaintiffs misapprehend the pace of operations at the OLF at Site C. Plaintiffs repeatedly exaggerate two of the effects that operating the OLF at Site C will have - - noise disruption and risk of bird-to-aircraft collision by alleging that the aircraft landings will occur at Site C at fifteen minute intervals, all day, everyday. (Cty Compl. at ¶¶ 67, 159; Motion for P.I. at 25-26). These assertions have no merit because they are based on Plaintiffs' mischaracterization of the Navy's planned operations. Contrary to Plaintiffs' assertions, the FEIS, at page 12-6, states that the Navy anticipates that there will be "an average of one to two FCLP training periods (45 minutes each) daily." Specifically, a "normal FCLP training period involves four to five aircraft each performing eight to 10 touch-and-go operations within a 45-minute period. Therefore, one 45-minute FCLP training period produces between 32 and 50 touch-and-go operations." (FEIS p. 12-6). Additionally, the Plaintiffs' characterization leaves a distorted impression that the tempo of the operations will be regular and incessant. As the FEIS states, however, "the tempo of operations

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[11]/ The low usage on these flight tracks is evident in the Day-Night Average Sound Level ("DNL"), *see* FEIS, p. 15-3, measurement for the Pocosin Lakes NWR, which accounts for the number of operations in proximity to the Pocosin Lakes NWR as well as the noise level and duration of each operation. The Navy's noise study showed that the average noise level, DNL, at the "B Canal Tract," the small, disconnected portion of the refuge that is closest to Site C, would be only 49 decibels (dB) (FEIS p. 12-122; Table 12-4) slightly above ambient noise level. While the Navy did not determine the average noise level at the main body of the refuge, it would clearly be less than 49 dB as it is even further away from Site C.

at the OLF will not be regular. Rather, the training operations will be sporadic, consisting of concentrated times of high-tempo operations followed by longer periods of few or no operations." (FEIS page 12-6).

Plaintiffs concerns about the long-term impact of aircraft noise on snow geese or tundra swans also are unsupported by the record. No studies exist that have analyzed the long-term impact of aircraft noise (or any other noise, for that matter) on snow geese or tundra swans. However, there has been at least one study that finds that other waterfowl are not adversely affected in close proximity to military air operations. For example, the Fleming, *et al.* (1996) study presented in the FEIS (Appendix B, p. B-41) evaluated the effects of low-level military aircraft activities on black ducks at the Marine Corps Piney Island Bombing Range in Carteret County, North Carolina. Results of the study showed that noise caused by low-level jet activities had negligible long term energetic and physiological effects on black ducks. While snow geese and tundra swans may react differently to aircraft noise than black ducks, the results of the Fleming study, considered in context with other studies and the Navy's site specific analysis, allowed the Navy to reach informed conclusions in the EIS.

The United States acknowledges that during the NEPA process it did not consider the findings in a 1972 study that a small aircraft on the North Slope of Alaska flushed snow geese as much as nine miles away at 700 feet, up to five miles away at 300 to 400 feet, and up to five miles away at 5,000 feet. *See* Plaintiffs Mtn. for P.I. at pp. 29 - 31. When considered in the context of the overall exhaustive analysis of the potential environmental impacts of OLF operations, however, this omission does not affect the validity of the analysis conducted by Navy, or contradict its conclusions regarding potential impact on snow geese. While the Navy did not

address the differences in sound environment between the North Slope of Alaska (in 1972) and conditions in and around Site C during the NEPA process, it is nevertheless reasonable for the Court to take notice that they are necessarily different environments. Conditions on the North Slope are that of quiet and seclusion. The fact that snow geese in a staging area (*i.e.*, an area where birds gather temporarily during migration) flushed when they heard aircraft up to nine miles away when in an area of such quiet and solitude is not indicative that snow geese in the Atlantic flyway, even a non-urbanized area, would react in the same manner. While the area in and around the refuge is undeveloped, snow geese and other birds in an overwintering area are clearly exposed to more human disturbance (including existing overflights), and have been for a long time, than on the North Slope of Alaska, one of the most remote parts of the North American continent. In fact, the current Refuge was expanded *underneath* existing military airspace. Plaintiffs argue that it would be improper to allow the Navy to proceed in light of the fact that there are some scientific uncertainties with respect to noise impacts on the specific species of waterfowl near the OLF site. However, an agency is not required to forego action merely because there is some scientific uncertainty. Nor is the agency required to conduct additional scientific studies to resolve these uncertainties; as long as the agency acknowledges the uncertainty and then analyses the science that is available, the Court should defer to the agency's analysis. *See* Baltimore Gas & Elec., 462 U.S. at 103. The Navy has faithfully discharged its "hard look" responsibilities under NEPA by examining the research that is available, and thus, the fact that there may be some uncertainty related to noise impacts on snow geese and tundra swans does not render the Navy's review of waterfowl impacts under NEPA deficient.

The FEIS satisfied NEPA in this regard. The Navy used an independent scientific team, comprised of biologists, independent contractors, and in-house experts to conduct a literature review and analysis on the potential impacts of noise on snow geese and tundra swans. FEIS Ch. 16. The FEIS was also based upon a detailed assessment of waterfowl in the geographic area surrounding the OLF Site, informed by meetings with interested private parties and other governmental organizations with expertise on wildlife-related issues. *See* FEIS p. 12-139; AR 122327 to AR 122328 and AR 118139 to AR 118141. The Navy's evaluation represents expert analysis of a summary of "existing credible scientific evidence" which is relevant to noise impacts on birds and thus complies with not only the letter but the spirit of the NEPA regulations. 40 C.F.R. 1502.22.

Finally, Plaintiffs allegations (Env. Compl. at ¶¶ 23, 39) about the possible impact of operations at the OLF on the experience of visitors to the refuge do not demonstrate any deficiency in the FEIS. The Navy's noise study showed that the average noise level, DNL, at the "B Canal Tract," the small, disconnected portion of the refuge that is closest to Site C,[12]/ would be only 49 decibels (dB) (FEIS p. 12-122; Table 12-4) slightly above ambient noise level. While the Navy did not determine the average noise level at the main body of the refuge, it would clearly be less than 49 dB as it is even further away from Site C. For purposes of comparison, the FEIS at Appendix B, p. B-5, states, "ambient background noise in metropolitan urbanized areas typically varies from 60 to 70 dB and can be as high as 80 dB or greater; quiet suburban neighborhoods experience ambient noise levels of approximately 45-50 dB (USEPA 1978)."

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[12]/ The B Canal Tract can clearly be seen – and distinguished from the main body of the refuge - on Figure 4.5.2-3, on page 4-187 in the Noise Study and FEIS, Figure 11-7, p. 11-37.

While the Plaintiffs (and even this Court) may disagree with the conclusions reached by the Navy about noise impacts of the new OLF, those conclusions were nevertheless based on the reasoned consideration of the available information by the Navy's experts. "[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive." Marsh, 490 U.S. at 378. Once a court is satisfied that an agency's exercise of discretion is truly informed, it "must defer to 'that informed discretion.'" Id. (*quoting* Kleppe, 427 U.S. at 412). Thus, the Navy did take the required 'hard look' at these environmental issues, and their conclusions are not arbitrary or capricious."

3. The FEIS Did Not Minimize the Impact of Bird-Aircraft Strike Hazards (BASH)

Plaintiffs devote an entire section of their Complaint to a challenge to the adequacy of the Navy's NEPA evaluation of bird strike risks to aircraft and pilots. See Cty. Compl. at ¶¶ 76-113. Plaintiffs allege that the Navy failed to include in the FEIS "[t]he specific elements of the management plan the Navy will employ to address the severe bird strike hazard that exists at Site C in order to assess the extent of impacts to waterfowl and the adjacent NWR" which they allege was required for "a reasoned choice among alternatives." Env. Pltfs.' Complaint ¶ 174. *See also* ¶¶ 109, 110, 112 and Cty. Compl. at ¶¶ 193-195. However, the Navy was not required to include such specifics in the FEIS as the BASH Plan has not yet been prepared, nor was it required to be prepared at this early date. A BASH Plan isn't developed until airfield configuration and approach/departure headings are finalized. Finalization of these parameters can not occur until permits and other approvals are obtained[13]/

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[13]/ *See* United States' argument concerning the extent of pre-ROD mitigation measures included by the Navy, *supra* at Section 6, pp. 52-55.

Unable to controvert Navy's NEPA analysis of BASH with documents referenced in the FEIS and the ROD, Plaintiffs submitted extra-record declarations from Ron Merritt and Colonel Jeffrey Short, USAF (RET) in conjunction with their Motion for P.I. These declarations do not qualify for inclusion in the administrative record.[14]/ These declarations take issue with the portion of the Navy's decision that relates to the BASH risk. The mere fact that Mr. Merritt and Mr. Short disagree with the Navy's conclusions is not, however, enough to meet the plaintiffs' heavy burden under NEPA to show that the Navy's analysis and its ultimate decision, as reflected in the ROD, was arbitrary and capricious.

The Plaintiffs first argue that the Navy's analysis of the BASH risk for Site C is based on an inappropriate interpretation of the Bird Avoidance Model ("BAM"). Env. Compl. at ¶¶ 86-105; Cty Compl. at ¶¶ 84-88. However, the record shows that the Navy's use of information from this model was entirely appropriate. Additionally, the Navy's use of BAM data was only "the first step in evaluating the relative BASH of the proposed OLF sites." FEIS at 12-128. As the FEIS noted, this model, despite some limitations, "does provide a relative measure of bird strike hazards for selected areas." FEIS at 12-129. More importantly, the Navy's BASH analysis involved far more than use of data from this model. The Navy also conducted comprehensive site-specific evaluations of the BASH risk for each of the six OLF sites being considered. FEIS p. 12-137 to 12-147; *see also* FEIS p. 2-105.

The Navy's analysis also included a review by Geo-Marine, Inc., ("GMI"), an

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[14]/ As more fully briefed in its Motion to Strike filed on March 4, 2004, these documents should not be considered by the Court in making its determination on the merits. If Plaintiffs attempt to use these documents again to support their arguments on the merits of their claims (as opposed to merely using them to determine the balance of harms), the United States will consider filing a renewed Motion to Strike.

"independent contractor with significant BASH program management experience," (AR163562-97; 68 Fed. Reg. 53,357), of the potential BASH hazards at all six sites being considered for an OLF. This review, *Bird Aircraft Strike Hazard (BASH) Analysis, Proposed Outlying Landing Fields (OLF)*, ("GMI study"), Exhibit 2 to Opp. to Mtn. for P.I., provided analysis of the BASH risk at all six sites, including general BASH management recommendations and, in the case of the four sites with the highest BASH risk, site-specific management recommendations.

The Plaintiffs nonetheless argue that the Navy's conclusion that the BASH risk at Site C could be managed based on a comparison of that risk to the BASH risk at other Navy installations on the East Coast, specifically NAS Oceana and NALF Fentress, is faulty given alleged differences in the "bird environment" surrounding those two facilities and Site C.

The Navy has never maintained that NAS Oceana, NALF Fentress and Site C are identical, for comparison purposes, with respect to the "bird environment." The record is nonetheless clear that the Navy's conclusion that they were similar enough to help support and permit an informed decision regarding management of the BASH risk at Site C is well-supported. Indeed, the summary section of the GMI report states, with respect to the BASH risk at all six sites studied, including Site C, that "[t]he U.S. Navy and U.S. Marine Corps have been conducting flight operations at NAS Oceana, Fentress NALF, and MCAS Cherry Point for many years under similar conditions." GMI study at 3-1. Exhibit 2 to Opp. to Mtn. for P.I. [15/]

The Plaintiffs also assert that site-specific differences exist between OLF Site C and the

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[15/] "Because Site C is located in a non-urbanized area within the Atlantic Flyway, the site will have an elevated BASH risk level during the fall and winter months. However, the BASH risk level will be similar to that which is currently being effectively managed at other East Coast military installations." 68 Fed. Reg. 53,356.

Dare County Range, that defy the Navy's effort to use Dare County as a surrogate for assessing BASH risk at Site C. The Navy freely acknowledges that the Dare County Range and Site C are not on par with respect to the BASH risk. But the Navy's assertion that the two are sufficiently comparable to help support the conclusion that the BASH risk at Site C could be managed was well-founded. As GMI noted in its study, in the summary section, "Additionally [that is, in addition to the experience of the Navy and Marine Corps described above at NAS Oceana, NALF Fentress, and MCAS Cherry Point], both services have been conducting low-level flight and range operations at the Dare County Bombing Range for decades." Id. Referring to the Dare County Bombing Range, the GMI study, at page 3-3, states that "The potential for serious bird strikes in this region are well documented, and the use of bird avoidance technologies such as BAM and the Avian Hazard Advisory System are used by the military services to mitigate much of the risk posed by the wintering bird populations."

In any event, it is clear that the Navy's conclusions were based not simply on these comparisons, but on *all* of its analyses. As discussed below, these analyses include: 1) field visits; 2) proximity to waterfowl loafing, foraging and roosting habitats; 3) vegetative cover; and, 4) the results of a radar study. Thus, taken as a whole, the Navy's evaluation of the BASH risk at Site C was more than adequate to support its conclusion that the risk could be managed.

In the case of Site C, the Navy's site-specific analysis included field visits, accompanied by federal and state wildlife officials, during the peak wintering periods. FEIS at 12-139. It also included consideration of data, provided by those same officials from the F&WS, regarding the numbers of birds to be found in areas such as Pungo Lake and Lake Phelps. FEIS at 12-138. These data indicated that the lakes "attract up to 90,000 snow geese and tundra swans during the

winter period." Id.

The Navy's site-specific analysis of Site C also included evaluating the proximity of waterfowl loafing, foraging, and roosting habitats to the OLF sites and associated flight tracks where aircraft altitudes would be at or below 3,000 feet AGL. Because 97% of birdstrikes occur at or below 3,000 feet AGL, FEIS at 12-137, the site-specific analysis focused on the area around the OLF sites where flight altitudes were at or below 3,000 feet AGL. In addition, as the FEIS notes, "Mishaps relating to wintering waterfowl are most likely to occur at altitudes below 1,000 feet AGL [citation omitted] because waterfowl moving between roosting and feeding areas generally fly at low altitudes." Id.

"Significant numbers of geese and swans were observed transiting to and from agricultural foraging areas located approximately 1 mile southwest and 1 mile north of Pungo Lake," which is part of the Pocosin Lakes NWR. (FEIS at 12-139). "Beyond these areas, only limited numbers of waterfowl were observed either in flight or foraging within agricultural areas." These observations indicated that "[s]now geese and tundra swans would . . . be present in the agricultural fields comprising much of the remaining area beneath the low-level flight paths (e.g. less than 3,000 feet, AGL); however, concentrations of geese and swans in these areas would be highly variable and significantly lower than those encountered in proximity to the eastern approach and holding-pattern flight paths." (FEIS at 12-120).

This is significant in that 86% of all operations at the OLF would occur along the FCLP flight tracks. Wyle Laboratories, Inc., 2003, Exhibit 2 to Opp. to Mtn. for P.I., at p. 4-180. Only flight tracks associated with the eastern approach and holding pattern were identified as being close to significant waterfowl concentrations (FEIS, p.12-121). However, given that the flight

altitudes along these flight tracks would be conducted at 2,000-2,500 feet AGL, and that most mishaps involving migratory waterfowl occur below 1,000 feet AGL, the Navy appropriately concluded that the BASH risk is manageable.

The Navy's site-specific analysis of BASH was also well informed because it included an assessment of the vegetative cover in and around the OLF site and below the flight tracks, locations of federal conservation easements, NWR land, and other public lands managed for wildlife conservation. (FEIS 12-135 to 12-145). A significant additional component of the BASH assessment completed for Site C was the evaluation completed by the Navy's BASH Program Manager and by individuals currently working on BASH issues at other naval air facilities. (68 Fed. Reg. 53,357; AR 134719). Based on all of the information, the Navy reasonably concluded that "a comprehensive BASH prevention program can be implemented and that aviation training could be conducted in a safe manner at this location [Site C]" (FEIS, p. 12-145; 68 Fed. Reg. 53,357).

The Navy's site-specific analysis of Site C reflected a "hard look" at BASH risk because it also included the results of a radar survey performed in February and March, 2003 as part of GMI's efforts. FEIS at 12-139. The purpose of the survey was to "sample bird movement patterns (directions and altitudes) and determine the extent of such bird movements relative to the airspace that would be used by aircraft operating at an OLF." Id. That is, its purpose was limited, to serve as "one data point relied on in the overall BASH assessment of all OLF sites . . . .". 68 Fed. Reg. 53,357. For these limited purposes, the radar study was entirely successful, as the GMI study states:

The radar portion of this study identified periods of time during which a

> significant number of potentially hazardous bird species moved through the airspace that would be used by aircraft operating at proposed OLF Site C. While the study was conducted over a short segment of the wintering season, it was clear that most bird activity occurred below 250 feet above ground level. Daily peaks in movements were also easily detected by the radar system. Visual observations further confirmed radar capability in detecting potentially hazardous bird movements in the area.

GMI study, page 3-1, Exhibit 4 to Opp. to Mtn. for P.I.

Based on the GMI study, the FEIS states that, "a large peak of activity was clearly detected during a three-hour period from 6 a.m. to 9 a.m. This trend is significant as it could be used in bird avoidance forecasting as well as to support active control procedures at the OLF" (FEIS, p.12-139 to 12-140; GMI Study 2-12). Using the GMI BASH Analysis report as reference, the FEIS rationally concluded that, "the overall amount of time when bird concentrations would cause an elevated risk is minimal in comparison to low risk periods," and that "daily peaks in bird movements and hourly trends in bird concentrations were easily detectable" (FEIS, p.12-145). Based on these factors, the Navy appropriately concluded that "the use of bird detection radar would greatly reduce the risk posed by birds at OLF Site C." As stated in the FEIS, the Navy is committed to preparing a detailed BASH plan and to providing mitigation measures to address this issue (which could include the use of bird detection radar, if deemed appropriate). FEIS pp. 147-148.

The Plaintiffs also take issue with the fact that Site C was the only one of the six locations being considered for an OLF at which a radar study was done. This particular challenge to the FEIS has no merit because, by the time the GMI BASH study was directed, in response to comments on the DEIS, Site C and Site E (Craven County) had already been determined to be the preferred alternatives for an OLF in the DEIS. (FEIS, p. ES-25). The Navy

therefore focused certain additional analyses solely on those two locations, as dictated by the issues raised in comments on the DEIS. Thus the Navy conducted additional analysis of the BASH risk (the radar study) at Site C, in particular, because of concerns expressed by agencies and organizations following the release of the DEIS over the particular BASH risk for this site, as opposed to Craven County. These additional efforts also included three field visits, two of which were conducted jointly with the F&WS and the North Carolina Wildlife Resources Commission ("NCWRC") between December 2002 and February 2003. AR 122327 to AR 122328 and AR 118139 to AR 118141.

Contrary to Plaintiffs' allegations, the FEIS did not minimize the impact of BASH at Site C, rather the Navy conducted a comprehensive evaluation of the BASH risk in full compliance with NEPA.

4. The FEIS Appropriately Considered all Wetland Issues

In their Motion for P.I., Plaintiffs alleged that "[t]he Navy's evaluation of alternative sites for the OLF was fundamentally flawed . . . [because] the Navy undertook a review of potential OLF sites based on an inaccurate methodology for determining the presence of wetlands and thus failed to objectively evaluate reasonable alternative locations." Mtn. for P.I. at 49.

Plaintiffs' assertion is incorrect. The Navy did an exceptionally thorough analysis in its review of OLF alternative locations before settling upon Site C as the location for the OLF. The Navy's screening methodology included the use of a full arsenal of analytical tools including: aerial photography, soil surveys, site reconnaissance, National Wetlands Inventory (NWI) maps, land use maps, helicopter reconnaissance, windshield surveys, and field visits. (FEIS, Appendix H, Part 1 of 3, Tab 2: Federal Agencies, comments USACE-CHAR, p. H-1-833 to H-1-834,

USACE-SAV, p. H-1-835 to H-1-836, and USACE-WIL, p. H-1-837 to H-1-842). The Navy verified that the 3,000 acre core area at Site C was converted cropland and therefore not wetlands by operation of federal wetlands regulations. 33 C.F.R. 328.3(a)(8)

The Plaintiffs' allegation of faulty methodology is flawed, as it relies almost entirely upon the Corps' comments concerning the use of NWI mapping and fails to consider the other methodologies actually used to identify potentially affected wetlands. The use of NWI mapping, *as one of several distinct data sources*, for purposes of screening alternative sites for further analysis is appropriate, given the relative accuracy of the mapping to identify significant wetland and open water complexes covering areas greater than 100 acres, and given the size of the areas being evaluated as part of the study (*e.g.*, an area within 50 nautical miles of three East Coast Navy installations, and the area between NAS Oceana and MCAS Cherry Point).

In any event, the NWI mapping was not the sole methodology used to identify wetlands areas. As discussed in the OLF Siting Study (p. 5-2), Exhibit 2 to Opp. to Mtn. for P.I., and in response to the Corps' comments on the DEIS, (FEIS, Appendix H, Part 1 of 3, p. H-1-5, Tab 1: Congressional Representatives, response to comment JWWW, p. 40 of 47), the Navy conducted site reconnaissance at each of the identified fourteen candidate sites as part of the site evaluation process. The site reconnaissance was completed by helicopter flyover and windshield survey. Given the number (14) and size (2,000-acre core area) of the alternative sites evaluated at this stage, the site reconnaissance, when combined with a review of NWI maps, soil surveys, and recent aerial photography, was more than adequate for determining the relative constraints posed by wetlands and open water at each site.

In addition, the Navy addressed all of the Corps' concerns about wetlands involved in the

Navy's study of OLF alternatives. The Navy received and considered the comments provided by the Corps, and publicly responded to their concerns regarding screening methodology in the FEIS. In addition, the Navy conducted a field review with the Corps on October 2, 2002, to identify the extent of wetlands at OLF Site E (Craven County, North Carolina). (AR 118096). Based on the field review, wetland coverage within Site E was determined to be consistent with the evaluation provided in the DEIS. Specifically, hydrological indicators, soil, and vegetation conditions indicated that 50% or more of the site would be considered Corps jurisdictional wetland. (FEIS p. 11-62 to 11-65). As the FEIS establishes, for the remaining OLF sites, "the use of NWI maps, in conjunction with recent aerial photography, soil surveys, and site reconnaissance, is . . . a suitable method for the site-screening process." (FEIS, Appendix H, Part 1 of 3, Tab 2: Federal Agencies, comments USACE-WIL, p. H-1-837 to H-1-842).

Contrary to Plaintiffs' suggestion (*see e.g.,* Env. Compl. at ¶¶ 180), the Navy was not required to conduct full wetland delineations for the construction projects at MCAS Cherry Point or at any of the OLF sites evaluated in the EIS. There is no statute or regulation requiring the Navy to conduct wetland delineations in accordance with the 1987 COE Wetlands Delineation Manual as part of a site screening process being completed in conjunction with an EIS. Although field-level delineations would yield much more accurate characterizations of wetlands within a site, the Navy reasonably determined that implementation of such surveys for each of the alternative OLF sites evaluated was not practicable given the size and number of sites. This was a reasonable and practical determination, and entirely within the Navy's discretion.

Thus, the FEIS fully and adequately considered all of the relevant wetlands issues in

preparing the FEIS.[16]/

5. The Navy Took the Required "Hard Look" at the Cumulative Impacts of the Proposed MOAs and the OLF

An EIS must describe the environmental impacts of the proposed action, any adverse environmental impacts of the proposed action that cannot be avoided, and alternatives to the proposed action which were considered by the agency. Methow Valley, 490 U.S. at 349. *See* 40 C.F.R. § 1502.16. This includes a requirement that federal agencies consider the cumulative environmental effects of their actions. Roanoke River Basin Ass'n, 940 F.2d at 64. The regulations specify that "effects include ecological . . . aesthetic, historic, cultural, economic, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. Section 1508.7 defines cumulative impact as:

> The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes

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[16]/ Plaintiffs have also claimed in their briefing before the Fourth Circuit that by acknowledging the need for a 404 permit during oral argument, that the Navy has admitted that there are wetlands on the property, which allegedly contradicts the Navy's FEIS. However, there is no such contradiction.

A 404 permit is necessary when one proposes to dredge or fill "navigable waters." Wetlands fall within the definition of navigable waters, but they are not the only waters so designated. A 404 permit is needed not only for wetlands, but also for non-wetlands that meet the definition of navigable waters. 33 U.S.C. 1344(a). In the instant case, the farmland at the Washington County site has been drained and used for farmland for many years. The farmland itself, therefore, is neither wetlands nor navigable waters, but is considered converted cropland under the law. 33 C.F.R. 328.3(a)(8). However, there are drainage ditches between the farm fields that, although not wetlands, will still almost certainly be considered to be "navigable waters of the United States" by the Corps. 33 U.S.C. 1362(7); 33 C.F.R. 328.3(a). A 404 permit will thus be required in order to place culverts in these drainage ditches to allow for construction of the OLF, even though the end result will be preservation of the ditch and the water flow therein. 33 U.S.C. 1344(f)(2). Thus, the Navy's need for a 404 permit has absolutely nothing to do with the existence of wetlands at the OLF site.

> such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Plaintiffs allege in their Complaints that the Navy failed to take a hard look at cumulative effects and erroneously concluded in the FEIS that the development and operation of the OLF and the use of the proposed Mattamuskeet and Core MOAs would not have cumulative impacts on the environment of the region. Env. Compl. at ¶¶ 172(d), 172 (e), 172 (h). Cty. Compl. at ¶¶ 5(b), 129, 204, 216. Plaintiffs further alleged in their Motion for P.I. "[t]he 'cumulative impacts' section of the FEIS includes a disjointed discussion of the 'proposed establishment of the two MOAs.'" Mtn. for P.I. at 44 (*citing* FEIS, pp. 13-10, *et seq.).* These contentions lack substance.

Plaintiffs' contentions that the Navy failed to consider cumulative impacts of establishing a new OLF with the two MOAs should be rejected out of hand. As Plaintiffs have expressly acknowledged, in the FEIS, the Navy examined the cumulative impacts of the OLF in conjunction with the proposed MOAs:

> The FEIS concludes the proposed Core MOA is more than 30 nautical miles from the nearest proposed OLF sites and there would be no cumulative impacts from developing an OLF and designating the Core MOA. (FEIS, p. 13-14). The FEIS further concludes 'only OLF Site D in Hyde County would be in proximity to the proposed [Mattamuskeet] MOA' and '[c]umulative impacts on eastern North Carolina would be minimal, as the Mattamuskeet MOA would be functionally independent of the proposed OLF.' (FEIS, pp. 13-14, 13-15)."

Mtn. for P.I. at 44 - 45. Plaintiffs assert that, although the Navy concluded in both the FEIS for the OLF and the Finding of No Significant Impact with respect to the proposals to designate the MOAs that there would be no cumulative impacts, the Navy's conclusions "are factually incorrect and thus arbitrary and capricious." Mtn. for P.I. at 45. As demonstrated above, this is

incorrect as the Navy did consider the cumulative impacts of the proposed MOAs and the OLF.[17]/

The Plaintiffs do not clearly state what "cumulative impacts" were omitted from the analysis, but suggest that it is the cumulative impact of aircraft operations at the Mattamuskeet MOA and aircraft operations at Site C on the migratory waterfowl (p. 46 of their Mtn. for P.I., "Since waterfowl move around the area in search of optimal foraging areas, they will be disturbed by aircraft noise resulting from both the proposed OLF at Site C and proposed MOA.") The Plaintiffs suggest that a cumulative impact would be the flushing of waterfowl when the flight operations occur on the eastern approach and holding pattern flight tracks, which are close to the Pungo Unit of the Pocosin Lakes NWR, and the training operations occurring in the Mattamuskeet MOA that would be at or just above 3,000 feet. (p. 45 para 2 of their Mtn. for P.I.) However, in Section 12 of the FEIS, the Navy examines these issues and concludes that waterfowl populations would not be affected by aircraft operations at OLF Site C due to the distance from the FCLP operations.

Plaintiffs also assert that the FEIS failed to take a hard look at the cumulative impacts of using other aircraft at the OLF (besides the Super Hornets) and the need for surge operations at the OLF. However, this claim, too, is meritless. Contrary to Plaintiffs' argument, the FEIS acknowledges that there is the potential for other military aircraft to use the OLF (FEIS, p. 12-23

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[17]/ The Navy also performed a thorough cumulative impact analysis on special use airspace that is based on the projected number and type of operations modeled in the *Airfield and Airspace Study for the Introduction of the F/A-18 E/Fs to the East Coast* (ATAC Corporation 2002, Exhibit 2 to Opp. to Mtn. for P.I.). This study provides the "hard look" at how the introduction of the F/A-18 E/F would impact all of the existing military training areas, including the proposed Core and Mattamuskeet MOAs. It includes projected operations by other military airspace users, as well as the impact of the change in airspace use associated with the transition of the F-14 Tomcat and F/A-18 C/D Hornet to Super Hornet squadrons.

and Appendix H, Part 3 of 3, Tab: Bertie County, response to comment GAH-5, p. 8 of 35), but declined to go any further because any effort to identify the period of time, number of operations, and type of aircraft would be speculative. In addition, given that the Super Hornet aircraft exhibits some of the highest noise levels for military aircraft; it necessarily follows that any other mix of aircraft types would be inclusive of the projected 60 DNL noise contour based on Super Hornet operations only. As a result, a different mix of aircraft would not likely contribute to the DNL as long as the total operations would not increase. (FEIS, p. 12-23 and Appendix H, Part 3 of 3, Tab: Bertie County, response to comment GAH-5, p. 8 of 35). In summary, the Navy took a "hard look" at the cumulative impacts.

The Navy has complied with NEPA with respect to its proposed MOAs and obligations concerning special use airspace. Plaintiffs' assertion that the Navy failed to take a hard look at the cumulative impacts of the proposal to establish the Core and Mattamuskeet MOAs and the OLF is simply wrong.

6. The Navy Provided Adequate and Feasible Mitigation Measures in Connection with the OLF

In the ROD, the Navy stated that, before constructing the new OLF, it will coordinate its plans for the siting and operation of the new OLF with other federal and state safety and natural resource agencies, and implement mitigation measures suggested by those agencies. Thus, the "Navy will prepare a site plan for construction of the runway at Site C, with a designated flight operations plan. This will be submitted to the Federal Aviation Administration (FAA) for a final aeronautical review/approval of Site C." 68 Fed. Reg. 53,355. In addition, under the Sikes Act (16 U.S.C. § 670a) the Navy must coordinate with the F&WS and the NCWRC to develop an

Integrated Natural Resources Management Plan ("INRMP") for Site C.[18]/ The Navy will also use a BASH reduction plan at the OLF similar to other plans that effectively reduce the risk of bird-aircraft collisions at other East Coast Navy installations. 68 Fed. Reg. 53,356.

Plaintiffs allege that the Navy did not offer any explanation, evidence, or reasonable detail about what their mitigation measures would look like, what their impacts would be, and whether or not they would be effective. *See* Cty. Compl. at ¶ 192-94, 199, 200. *See also* Env. Compl. at ¶ 172(g). This argument cannot be sustained. It is true, as the Supreme Court has stated, an EIS without a "reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." Methow Valley, 490 U.S. at 352. But the Supreme Court also noted:

> There is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . [I]t would be inconsistent with NEPA's reliance on procedural mechanisms--as opposed to substantive, result-based standards--to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

Id., at 352-53 (citation omitted). Because the Navy has explained the extensive mitigation efforts planned in conjunction with the OLF, it has more than satisfied its NEPA obligations to discuss mitigation. The following evidence illustrates the extent to which the Navy has taken a "hard look" at mitigation:

Wildlife. In recognition that low-level flights down to 2,000 feet (AGL) along portions

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[18]/ "INRMPs have proven to be effective natural resources management tools on other naval installations and military bases around the country." 68 Fed. Reg. 53,356-357. "The INRMP will outline the overall natural resource management objectives of the OLF and ensure that these objectives are designed to protect and preserve the mission of the OLF and all on-station natural resources." 68 Fed. Reg. 53,356.

of the eastern approach and holding-pattern flight paths could cause snow geese to flush more frequently from their loafing and feeding sites, FEIS, p.12-121 states that, "...the Navy would work with the USFWS and state resource agencies to evaluate site-specific mitigation measures to reduce potential impacts to snow goose populations."

BASH. FEIS, p.12-147 to 12-148 identifies the procedures that would be implemented at the OLF site to minimize the overall BASH risk. Habitat management is identified as one of the BASH minimization procedures. Specifically for Site C, the FEIS, p. 12-123, states, "removal or modification of agricultural land around the core area as part of the BASH plan would not be expected to adversely affect regional waterfowl populations." Based on this assessment, a discussion of mitigation measures to offset the loss of waterfowl habitat at the OLF site was determined not to be necessary.

Surface Waters. In recognition that surface waters could be impacted at the OLF site as a result of grading and surface alterations, the FEIS, p. 12-163, outlines numerous mitigation measures that will be implemented to prevent or minimize surface water impacts.

Land Use and Noise. The FEIS, p.12-65, states, "To ensure existing uses and future development are compatible with the OLF site, and to mitigate noise-related impacts to residents in the vicinity of the site, the Navy would seek to acquire residences within the 60 DNL noise contour and relocate all occupants." The FEIS includes a complete discussion of impacts associated with this mitigation strategy in terms of resident displacements, local taxes and revenues, environmental justice, and prime farmland (FEIS, p. 12-65, 12-97 to 12-99, 12-100 to 12-105, and 12-109 to 12-112).

Soils. In recognition that impacts to soils would occur during construction of the OLF,

the FEIS, p. 12-108 states that the "The Navy would implement a soil erosion and sediment control plan to minimize potential soil erosion during construction and grading of the runway."

The FEIS, at p. 12-148, also states that, "[a]n INRMP for the selected OLF site would need to be prepared...", and that "the INRMP for the selected site would outline the overall natural resource management objectives of the facility and ensure that the management objectives are designed to protect and preserve the mission of the OLF and all on-station natural resources, such as the wetlands, water quality, and threatened and endangered species."

The Navy is required by the Sikes Act to coordinate and receive concurrence from the USFWS and NCWRC on its INRMP. The Navy is also required to conduct a NEPA analysis on the INRMP. Thus, site specific mitigation measures will be incorporated as a part of the INRMP.

7. A Supplemental Environmental Impact Statement is Not Warranted

A SEIS is required when there "are *significant* new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c)(1)(ii) (*emphasis added*). "[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information outdated by the time a decision is made." Marsh, 490 U.S. at 373. The question of whether information rises to the level of requiring a SEIS "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." Marsh, 490 U.S. at 376. Therefore, courts must uphold an agency determination that a supplemental EIS is not required if that determination is not arbitrary and capricious. Hughes River, 81 F.3d at 443. Plaintiffs claim that new information that has arisen since the issuance of the FEIS and changes from the DEIS stage to the FEIS stage are serious and

significant, and required the Navy to prepare a SEIS. Cty. Compl. at ¶¶ 5(c), 143, 225; Env. Compl. at ¶ 184-187. This claim is likewise groundless. Contrary to Plaintiffs' contentions, nothing that has happened since the preparation of the EIS, however, that would trigger the need for a SEIS, and thus, the Navy's decision not to prepare one should be given deference by this Court.

8. The Counties Do Not Have Standing to Raise CZMA claims and, Nonetheless, the Navy Has Fully Complied with the CZMA

The United States has filed a Motion to Dismiss the County Plaintiffs' claim that the Navy violated the CZMA (and the CAMA). In its memorandum in support of dismissal, the United States demonstrated that the County Plaintiffs do not have standing to assert a CZMA claim against the United States, but even if they were to have standing, the Navy has nonetheless fully complied with the CZMA. Therefore, in the event the Court does not dismiss the CZMA claim, the Court should grant summary judgment to the United States.

In the interest of brevity, the United States will not repeat the previous arguments made concerning the County Plaintiffs' CZMA claims; rather, the United States hereby incorporates by reference those previous arguments set forth in the United States' Motion to Dismiss and Reply Memorandum. However, the United States has provided the Court with recent supplemental authority from the Court of Appeals for the Ninth Circuit, City of Sausalito v. O'Neill, No. 02-16585, 2004 WL 2348385 (9th Cir., Oct. 20, 2004), related to County Plaintiffs' lack of standing pursuant to the CZMA.

The Court should find that the City of Sausalito case does not control the issue of whether the County Plaintiffs have CZMA standing because the Ninth Circuit failed to consider the

Congressional requirement that each federally approved coastal management program designate one single state agency as the sole voice of the state's authority for CZMA federal consistency. 16 U.S.C. 1455(d)(3)(B) and 1455(d)(6); 15 C.F.R. 923.47(b), 930.6, 930.11(o). In addition, the Ninth Circuit relied on CZMA cases where prudential standing was either not discussed or was assumed based on the participation of the state in the litigation. Further, the facts in this case are significantly different from those in City of Sausalito.

Under the CZMA, it is the states, not counties, that may concur in federal agency consistency determinations. Conversely, only states may object to such determination. The State has already concurred with the Navy's consistency determination. But, even if the State were deemed not to have concurred with the Navy's consistency determination and even if it were assumed that the Navy's proposed actions are not fully consistent with the State's plan, the Navy's home basing and OLF decision must be sustained under the CZMA because both are nevertheless consistent, to the maximum extent practicable, with the federally-approved enforceable policies in the State's plan. 16 U.S.C. § 307(c)(1).[19]/ Under Federal law, the Navy is required to train its forces to be ready for conducting warfare at sea (*see* 10 U.S.C. § 5062). The Navy has considered and adopted the State's policies into its action. Moreover, the CZMA

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[19]/ North Carolina has a NOAA approved Coastal Management Plan ("CMP") (September 1978). North Carolina is one of the coastal States that includes local land use plans in its NOAA-approved CMP. Thus, policies in the local plans are enforceable policies of the North Carolina CMP, so long as the policies are legally enforceable under State law, 16 U.S.C. § 1453(6a), and have been approved by NOAA, pursuant to 15 C.F.R. part 923, subpart H. NOAA's Office of Ocean and Coastal Resource Management last approved Washington County's and Beaufort County's land use plans in 1999, for the land use plans dated 1994 (Washington County), and March 1993 (Beaufort County). Washington Plan submitted with supplement to AR on November 19, 2004, and Beaufort Plan attached hereto as Exhibit 4. The enforceable policies of the two plans are nearly identical. Beaufort County's 1997 land use plan is not part of the NOAA-approved North Carolina CMP.

makes clear that it is the federal agency undertaking an activity that determines whether that activity may have an effect on the coastal zone. 16 U.S.C. § 307(c)(1). Here, the Navy determined that the decision to home base Super Hornets on the East Coast and construct an OLF in North Carolina would have coastal effects. The Navy then evaluated those effects and determined the Site C OLF was consistent with North Carolina's CMP and based that determination upon the best available scientific information and the State's enforceable policies.

Accordingly, the Navy may proceed with its plan to implement the ROD and FEIS, insofar as the State has already concurred with the Navy's plan, the Navy has determined that its activities are consistent to the maximum extent practicable with the enforceable policies of the state's CMP, 15 C.F.R. 930.43(d) Note (2001), and the Navy has declined supplemental CZMA review because there has not been any substantial change to the proposal. County Plaintiffs' allegations that "the Navy plainly violate[d] the CZMA regulations" because it "failed to review the construction and operation of the OLF for consistency with enforceable policies of the Beaufort Plan. . ." are thus clearly wrong.

The United States has moved this Court to dismiss the CZMA claim filed by the County Plaintiffs. In the event the Court denies the Motion to Dismiss, it should, for the reasons explained above, grant the United States summary judgment, and reject the County Plaintiffs' CZMA claim.

C. Plaintiffs Fail to Meet the Prerequisites for a Permanent Injunction

1. The Preliminary Injunction Should be Vacated

As demonstrated above, the United States has fully complied with NEPA and the CZMA, and thus should be granted summary judgment with respect to all of Plaintiffs' claims.

Therefore, the preliminary injunction previously entered by this Court should be vacated and no permanent injunction should be issued. However, even if this Court disagrees and were to find some legal violation, the Court's existing preliminary injunction should be dissolved and the Navy's construction activities allowed to proceed according to schedule.

The Supreme Court has held that courts are *not obligated* to grant injunctive relief even where an environmental statute has been violated. Weinberger v. Romero-Barcelo, 456 U.S. 305, 317-320 (1982). Rather, courts must balance competing claims of injury. In this case, the record establishes a compelling national security need for the OLF that outweighs Plaintiffs' alleged injuries. In addition, the Navy has shown that the OLF can be constructed and operated safely with minimal risk of harm to the environment. Balancing these interests compels the conclusion that the Court should not issue the permanent injunction that Plaintiffs seek.

The Plaintiffs informed the United States on November 5th that, in addition to asking that the OLF be permanently enjoined, they intend to ask that the entire ROD be vacated, and that the Navy be permanently enjoined from "directly or indirectly taking any further activity associated with the Super Hornet project until it has fully complied with NEPA." In other words, it appears that the Plaintiffs intend to ask the court to permanently enjoin not only the OLF but also the home basing decision as well.

To demonstrate the extreme harm the Navy, and the Country as a whole, would suffer from enjoining the home basing component of the ROD, the Navy has attached the declaration of Admiral John Nathman, the Vice Chief of Naval Operations (VCNO), who occupies the second senior position in the Navy chain of command. Exhibit 1, attached hereto. Admiral Nathman makes clear that the Super Hornet aircraft must be brought into service to replace aging aircraft,

that this transition cannot be delayed, and the East Coast home basing pursuant to the ROD is "an indispensable part of the transition." Nathman Decl. at para. 31. Admiral Nathman further states that this home basing is well underway at NAS Oceana, and that "the facilities, equipment and personnel are not available elsewhere." Id.. at para. 30. Any delay in the home basing will leave the Atlantic Fleet "without an adequate force of strike aircraft and without the crews and personnel to operate and maintain them. Because of the Global War on Terrorism, the potential impact of any delay has grave consequences to naval aviation and readiness." Id.. at para. 31. The Court should therefore not grant an injunction against the home basing either.

Even if the Court finds portions of the Navy's NEPA analysis regarding the OLF to be inadequate, the home basing decision should nonetheless not be enjoined. Wastelands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853 (9th Cir. 2004) (In action by water and utility districts against Department of Interior, challenging administration of federal water project and implementation of fisheries restoration legislation, district court did not abuse its discretion in applying traditional balance of harms analysis to determine it was appropriate to allow portions of ROD to be implemented; the district court found that balance of hardships favored enjoining implementation of water flows recommended within agency's ROD pertaining to restoration, except for dry or critically dry years, pending agency's completion of SEIS under NEPA, but disfavored enjoining nonflow measures within ROD).

2. Standard For A Permanent Injunction

In deciding to grant or not grant injunctive relief, the Fourth Circuit analyzes four equitable factors:

(1) the likelihood of irreparable harm to the plaintiff if the preliminary

injunction is not granted;
(2) the likelihood of harm to the defendant if the preliminary injunction is granted;
(3) the likelihood that plaintiff will succeed on the merits; and,
(4) the extent to which an injunction would harm the public interest.

Hughes Network Sys. Inc. v. Interdigital Comm. Corp., 17 F.3d 691, 693 (4th Cir. 1994). The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits rather than a likelihood of success. *See, e.g.*, University of Texas v. Camenisch, 451 U.S. 390, 392 (1981). Amoco Production Co. v. Village of Gambell, AK, 480 U.S. 531, 546 n.12 (1987); Wilson v. Office of Civilian Health and Medical Programs of Uniformed Services, 65 F.3d 361 (4th Cir. 1995) (to obtain a permanent injunction, plaintiff must have demonstrated that her claims have merit and are invalid under the APA, thus, arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law). It is Plaintiffs in this case that bear "the burden of establishing that these factors favor granting the injunction." Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997) (*citing* Direx Israel, LTD. v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991).

Notably, Plaintiffs' burden of proof is especially heavy where, as here, they seek to halt a governmental program intended to serve the public interest. Yakus v. United States, 321 U.S. 414, 440 (1944). Given the military preparedness and training needs of the Department of Defense during the ongoing War on Terror, there can be no doubt that the Navy's plans to home base the Super Hornet aircraft in accordance with the ROD, and to construct and operate an OLF at Site C are intended to serve the "public interest."

As shown above, Plaintiffs have not demonstrated that they should prevail on the merits of their NEPA and CZMA claims; to the contrary, the United States has shown that it should be

granted summary judgment as to all of Plaintiffs' claims. Further, home basing the Super Hornet aircraft in accordance with the ROD and the construction and operation of the OLF will not harm Plaintiffs irreparably and both the public interest and the Navy would be harmed if the Navy was prevented from home basing the Super Hornet aircraft or constructing the OLF as scheduled.

3. Plaintiffs Cannot Show that They Will be Irreparably Harmed by the Navy's Home Basing Decision or the Decision to Construct and Operated an OLF at Site C

The Plaintiffs have yet to articulate why home basing the Super Hornet aircraft pursuant to the ROD will cause them any harm, much less irreparable harm, so the United States will have to withhold further substantive argument on this point until they do so. With respect to the OLF component of the ROD, none of Plaintiffs' declarations submitted at the preliminary injunction stage provides evidence that the construction or operation of the OLF will result in the dramatic consequences that Plaintiffs allege. At most, the harms they identify are speculative and remote.[20]/ In short, Plaintiffs have failed to demonstrate irreparable harm.

In addition to the environmental injuries claimed, Plaintiffs further allege that "perhaps most important, construction of the OLF at Site C will result in the permanent displacement and dislocation of more than 100 landowners . . . . whose property will be taken by the Navy. . ." Mtn. for P.I. at 17. In the Opp. to Mtn. for P.I., the United States argued that the plaintiffs have

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[20]/ In fact, as Rear Admiral Turcotte stated in his declaration, which was filed with the United States' Opp. to Mtn. for P.I. as Exhibit 7, one of the Plaintiffs' concerns has already been overtaken by events, because the Navy has decided to move the projected holding pattern that passes near the NWR. Id. at para. 12. This projected holding pattern, which was used during the NEPA process for noise modeling purposes, will be moved, either by moving it away from the Refuge, by significantly elevating its altitude, or both. Moreover, as Rear Admiral Turcotte notes, the Navy is committed to placing a bird radar on site if the Navy determines it is appropriate to do so to manage the BASH risk. Id. at para. 13.

no standing to assert this claim. Moreover, as Rear Admiral Richard E. Cellon's declaration establishes, ("Cellon Decl." dated May 3, 2004, Exhibit 2 to United States' Motion for Reconsideration, filed May 4, 2004), the Plaintiffs do not represent the views or interest of all property owners in the proposed OLF area. As Rear Admiral Cellon has explained, a number of the landowners in the core area voluntarily sold 1,157 acres to the Navy before the injunction was issued. Cellon Decl. at para. 4. Unless the injunction is vacated, the Plaintiffs, far from representing the interests of the landowners, will have succeeded in *interfering* with the rights of any other owners who wish to sell.[21]/

In any event, the Navy's activities are, for now, limited to the approximately 3,000-acre core area, and in particular the approximately 750-acre construction area. There cannot be any environmental impact to the rest of the approximately 30,000 acres included in the OLF project until flight operations begin in approximately February, 2008, at the earliest. "Second Cellon Decl." dated August 31, 2004, Exhibit B to United States' Motion to Stay, Suspend or Modify Preliminay Injunction Pending Appeal, filed September 10, 2004, at para. 5. And, as Rear Admiral Cellon's first declaration makes clear, even after flight operations begin, the agricultural nature of the land will remain largely unchanged. Cellon Decl. at para. 7.

In stark contrast to this substantial harm to the Navy and the United States, as discussed

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[21]/ As to the balance of the core area not already acquired through voluntary sales (1866 acres), absolutely no harm will occur of the nature articulated by Plaintiffs with regard to absentee owners who control 1572 acres and lease their farm land to tenant farmers. While tenant farmers may be impacted, that impact will not take place until construction begins on the relatively small area of approximately 750 acres in the core area. Furthermore, one landowner believes strongly enough that he is being harmed by the inability to sell his property to the Navy that he has gone to the trouble and expense of filing an amicus brief with the Fourth Circuit; and the Fourth Circuit has granted his permission to file the brief.

below, there is no imminent or immediate harm to the Plaintiffs from denying injunctive relief. In defining the equitable threshold for injunctive relief, the Supreme Court has specifically held that, absent immediate and irremediable injuries the violation of an environmental statute, even if there is one, cannot by itself establish irreparable injury. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542-545 (1987) (*internal quotations omitted*); *see also* Romero-Barcelo, 456 U.S. at 317-320. *See e.g.,* Quince Orchard Valley Citizens Ass'n. v. Hodel, 872 F.2d 75, 78-79 (4th Cir. 1989).

In NEPA cases courts have refused to enjoin activities for reasons of national security. *See, .e.g.*, Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 796, 797-798 (D.C. Cir. 1971); Wisconsin v. Weinberger, 745 F.2d 412, 427 (7th Cir. 1984) ("More important, however, is the district court's failure to balance the weight of the alleged NEPA violation against the harm the injunction would cause the Navy and to this country's defense") ("NEPA cannot be construed to elevate automatically its procedural requirements above all other national considerations." Id. at 425).

Even in Romero-Barcelo, a case brought under the Clean Water Act, a statute with its own grant of jurisdiction affording courts the ability "to enforce" the law, the Supreme Court emphasized there is inherent discretion in the federal courts to decline to issue injunctions, even in the face of ongoing CWA violations. There, the plaintiff alleged that Navy exercises on the island of Vieques violated the Clean Water Act. The Supreme Court held that the district court did not err in refusing to issue an injunction. "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every

violation of law." Romero-Barcelo, 456 U.S. at 313. However, the Court also indicated that the district court could not "ignore[] the statutory violations," id. at 315, but had to "order relief that will achieve *compliance* with the Act." Id. at 318 (emphasis in original). The district court there acted within its discretion, the Court held, when it allowed the Navy to continue its activities while applying for a permit. Id. at 315. Thus, even were the Court to find a substantive violation of the NEPA, or the CZMA, the Court retains equitable discretion not to enjoin the home basing of the Super Hornets or construction of the OLF, while the Navy takes whatever further action may be required to demonstrate NEPA or CZMA compliance. Limiting any injunctive relief would be particularly warranted under the facts before the Court.

4. The Navy and the Nation as a Whole Will be Injured if a Permanent Injunction is Granted

In contrast to Plaintiffs' allegations of harm, which, as shown above, are speculative and remote, the harms to the Navy, and to the defense and security interests of the United States, from a permanent injunction are immediate, demonstrable, and severe. As Admiral Nathman argues forcefully in his declaration, not allowing the home basing to proceed without delay will have catastrophic consequences for the Navy and the national security of the United States. And, as the other declarations already before the Court make clear, not allowing the Navy to proceed with construction of the OLF will frustrate the Navy's mission to deploy to protect the interests of the United States and harm its ability to train its pilots.

Because of the ripple effects any delay in this project would have, the Navy will be harmed for years if its plan for the OLF becomes subject to a permanent injunction. Crabtree Declaration ("Crabtree Decl."). Exhibit 6 to Opp. to Mtn. for P.I. Because any delays to the

operation of the OLF will cause harm to the Navy and the United States, "it is critical that the new OLF in Washington County be available for use at the earliest possible date." Zortman Declaration at 8 ("Zortman Decl.") (Exhibit 5 to Opp. to Mtn. for P.I.).

The harm to our national defense, *i.e.*, the Navy's inability to utilize its most formidable aircraft and train in the most effective manner, is the most important factor to be weighed in assessing the propriety of Plaintiffs' request for permanent injunctive relief. State of Wisconsin v. Weinberger, 745 F.2d 412, 427 (7th Cir. 1984). The construction of the OLF is essential to national defense because the OLF serves as a "critical component of preparing for the arrival of the Super Hornet [to the East Coast]. . ." Zortman Decl. at 4.

As to the critical and immediate harm to the United States (not simply the Navy), the declarations of Admiral Fallon, Commander, U.S. Fleet Forces Command, and the VCNO, Admiral Nathman, both establish that very real and substantial harm to the United States. ("Fallon Decl.") Exhibit 1 to United States' Motion for Reconsideration and the VCNO Declaration, attached hereto as Exhibit 1. This significant harm greatly outweighs any need for an injunction, especially when there is absolutely no immediate or imminent harm to the Plaintiffs.

Allowing the Navy to proceed with construction of the OLF translates into greater safety for aircrews. As Admiral Fallon makes clear in his declaration, the delay to the Navy in making the new OLF operational and available for training is significant to aircrew safety, because the new OLF will provide better, more realistic training than existing facilities, in particular at nighttime. Fallon Decl., paragraphs 10-15.

As Admiral Fallon states emphatically in his declaration: "Better, more realistic training,

such as that available at the new OLF site, will result in greater safety margins for the aircrews who will benefit from it. As the senior uniformed officer in command of those aircrews, I must do everything in my power to provide them that greater margin of safety at the earliest time feasible." Fallon Decl. para. 16.[22]/ Admiral Fallon also explains that although the existing OLF (Fentress) for aircraft based at NAS Oceana, "still a much-needed and heavily-used training field," (Fallon Decl., para.12), Fentress has a number of factors which degrade the effectiveness of training conducted there. Fallon Decl., paras. 13-15. Thus, while Fentress provides valuable training, "the fact is the first time an aviator actually lands at sea on a dark night will be more difficult than it has to be if he did his night FCLP training at Fentress." Fallon Decl., para. 14.

The new OLF is also badly needed, and as soon as possible, to provide additional training flexibility in the event that the Navy needs to "surge" to respond to immediate national security threats. As Admiral Fallon states in his declaration, "[T]he Fentress OLF was, and remains, incapable by itself of meeting East Coast FCLP requirements for surging multiple carrier strike groups. Capacity can be rapidly saturated when any significant departure from normal operational levels occurs. Until another OLF is available for NAS Oceana and MCAS Cherry Point based aircraft, the Navy lacks sufficient OLF capacity to meet FRP surge requirements." Fallon Decl. para. 23. The lack of sufficient surge capacity requires use of alternative measures, causing harm in the form of additional family separation for Navy personnel, as outlined in the

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[22]/ The United States acknowledges that, even under the Navy's own plan, the new OLF would not become operational until approximately July, 2007 (*See* Crabtree Decl., which describes the Navy's schedule for constructing the OLF), and in light of the injunction, it will now be February, 2008 at the earliest. Second Cellon Decl., at para. 5. As Mr. Crabtree explained, the Navy could not begin the many, necessarily lengthy, steps to build the OLF until the Record of Decision was signed and money appropriated for that purpose.

declaration of Rear Admiral James M. Zortman, Exhibit 5 to Opp. to Mtn. for P.I., paras. 18 - 20.

Admiral Zortman also explained in his declaration why the OLF at Site C is so critical, in part because the current OLF at NALF Fentress operates under so many restrictions that degrade the FCLP training conducted there.

Simply put, Plaintiffs' requested injunction necessarily fails the balancing test required of this Court because their assertions of injury are highly speculative, not imminent, unsupported by the administrative record, and, in any event, do not "tip sharply in their favor" given the serious harms an injunction would occasion to the national defense interests, described above.

5. A Permanent Injunction Can Only Be Issued After Balancing Claims Of Injury and an Injunction Would Disserve the Public

The public interest, in the form of national security and military preparedness, is at the heart of this matter. Regarding the home basing component of the ROD, Admiral Nathman makes clear that a delay of the Super Hornet basing will cause great harm to national security. Regarding the OLF component of the ROD, Admiral Fallon, the commander of the U.S. Atlantic Fleet has said, under oath, "Every day that the Navy is prevented from moving forward with an Outlying Landing Field (OLF) in Washington County has an impact on Naval aviation readiness." Fallon Decl. at para. 6. This further explains the critical need for the OLF, that was originally explained during the preliminary injunction proceeding in the declarations of Admirals Turcotte and Zortman.

6. Adequate Legal Remedies Exist To Address Any Legal Violation

Finally, this is not a situation where no adequate remedies exist to protect Plaintiffs' interests. The Court can issue declaratory relief regarding any legal violations, and the

Defendants can take steps to correct those legal violations in response to the Court's findings. In the meantime, as explained above, to the extent required by the Court's rulings on the merits, the Navy could conduct any additional analysis related to environmental impacts of the OLF and take appropriate mitigation measures. It is well established that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). *See also* State of North Carolina v. City of Virginia Beach, 951 F.2d 596 (4th Cir. 1991); South Carolina Dept. of Wildlife and Marine Resources v. Marsh, 866 F.2d 97 (4th Cir. 1989). Consistent with Romero-Barcelo, *supra*, the Navy could simultaneously prepare a SEIS *and* continue the detailed planing for Site C.

Thus, here, where the APA contemplates that injunctive relief should be granted only under extraordinary circumstances, where the Supreme Court confirms the limited availability of injunctive relief, where the Navy has committed to continue to analyze any potential impacts and take appropriate mitigation measures before the OLF is operational, where the potential degree of harm to the environment is low, and the harm to the military, the public interest, and national security is great, and where the harm to Plaintiffs of denying equitable relief is not substantial, the Court should not issue a permanent injunction enjoining the construction of the OLF as Plaintiffs request. This is precisely the approach that the Supreme Court upheld in Romero-Barcelo and, to the extent the Court finds that Plaintiffs are entitled to any relief, it should be followed here.[23]/

Finally, a permanent injunction would not merely consist of a short delay without impact

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[23]/ If any injunction is issued, it should be narrowly tailored so as to enjoin only those activities with a potential impact on the environment, such as breaking ground for construction or operation of the OLF, prior to the completion of a SEIS.

to national security or military preparedness. The relief that Plaintiffs seek, if entirely successful on their claims, would cause a significant delay. As discussed above, this delay would have a real impact on the public interest in the form of specific national security concerns and deal a significant blow to our military preparedness in the form of the ability to train our pilots.

Thus, compelling and immediate threats to national security, as attested to by the Navy officials responsible for military preparedness, tip the balance of the harms dramatically towards the Navy and the United States in this action.

VI. Conclusion

Without question, the Navy took a hard look at the environmental effects of its proposed action to construct an OLF in Washington County, North Carolina, and complied with NEPA and the CZMA. The Navy has amply demonstrated the harm posed to readiness of the Atlantic Fleet and the Nation as a whole if this Court were to enjoin the home basing of the Super Hornets according to the ROD, or to continue to enjoin the construction schedule of the OLF, and that it is in the public interest to deny Plaintiffs' request for a permanent injunction to enjoin this essential component needed for military training.

For the reasons stated above, Plaintiffs' Motion for Summary Judgment and Motion for Permanent Injunction should be DENIED and the County Plaintiffs' claim regarding the CZMA should be dismissed. The Court should grant summary judgment for the United States on the NEPA claims, and, in the event the Court denies the United States' Motion to Dismiss the CZMA claims, the Court should grant summary judgment to the United States on that claim also.

Respectfully submitted this 22nd day of November, 2004.

FRANK D. WHITNEY
United States Attorney
District of North Carolina

(for) R.A. RENFER, JR.
Assistant United States Attorney
Chief, Civil Division

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

(for) STEPHEN G. BARTELL, Attorney
United States Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Tele.: (202)305-0234
Fax: (202)305-0274

Of Counsel for Defendant:
Robert J. Smith, Attorney
Senior Trial Attorney
Navy Litigation Office
Building 36, Washington Navy Yard
Washington D.C. 20374

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, that on the 22nd day of November, 2004, I served a true and correct copy of the "United States' Motion for Summary Judgment and Memorandum in Support" by mailing it via Federal Express (pursuant to agreement by opposing counsel) to counsel at the places and addresses below stated:

Derb S. Carter, Esq.
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, NC 27514
Counsel for National Audubon Society, North Carolina Wildlife Federation and Defenders of Wildlife

Kiran H. Mehta, Esq.
Kennedy, Covington, Lobdell & Hickman, LLP
214 N. Tryon Street, 47th Floor
Charlotte, NC 28202
Counsel for Washington County and Beaufort County